(1) 88-1347

Supreme Court, U.S.
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

*Petitioner,*

*v.*

MAURICE P. FOLEY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 11, 1989

## QUESTIONS PRESENTED

Whether the Court of Appeals abused its discretion and deprived Respondent of his right to a hearing in deciding the case below on factual issues raised for the first time after judgment and never litigated at the trial court level.

## LIST OF PARTIES

The parties to this proceeding are Petitioner, Gary Green, and Respondent, Maurice P. Foley.

The same parties appeared in the proceedings below.

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The petitioner, Gary Green, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on September 13, 1988.[1]

[1] Petitioner's Petition for Rehearing, Suggestion for Rehearing In Banc, and Motion To Supplement The Appellate Record were denied on October 14, 1988.

## OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 856 F.2d 660 and is reprinted in the Appendix hereto, p. 3a, *infra.*

The memoranda decisions of the United States District Court for the Eastern District of Virginia (Bryan, C.D.J.) are unreported. They are reprinted in the Appendix hereto pp. 37a, 68a, 69a, *infra.*

## JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, the petitioner brought this suit in the United States District Court for the District of Maryland. On March 5, 1987, venue was changed, pursuant to 28 U.S.C. §1404, and the case transferred, in accordance with 28 U.S.C. §1391(a), to the United States District Court for the Eastern District of Virginia.

On July 22, 1987, acting on cross-motions for summary judgment, the Eastern District of Virginia granted partial summary judgment for petitioner and dismissed petitioner's remaining claims. On July 31, 1987, the district court denied respondent's Motion to Vacate Summary Judgment And Grant Rehearing And Reconsideration pursuant to Rule 59(e). On October 30, 1987, the district court denied respondent's Motion For Relief From Judgment pursuant to Rule 60(b)(3).

On respondent's consolidated appeals, the Fourth Circuit, on September 30, 1988, reversed the decisions of the Eastern District and remanded the case with instructions to enter judgment for respondent.

Petitioner's Petition For Rehearing, Suggestion For Rehearing In Banc, And Motion To Supplement The Appellate Record were denied on October 14, 1988.

The jurisdiction of this Court to review the decision and order of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of The United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Seventh Amendment to the Constitution of the United States provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

## STATEMENT OF THE CASE

Respondent, Maurice P. Foley, together with Alan H. Silverstein and Stephen Zimpel, were partners in Fairfax Associates, Ltd.[2] ("Fairfax Associates"). Fairfax Associates was formed solely for the purpose of engaging in a single construction project, Fairfax Gardens Condominiums, which was completed at a loss.

On August 2, 1982, Fairfax Associates borrowed funds from Mount Vernon Savings and Loan Association ("Mount Vernon") (succeeded by Crossland Savings Bank) and gave a deed of trust note to Mount Vernon. Zimple, Foley and their wives executed a Guaranty Agreement, in which they assumed liability as guarantors of the Mount Vernon note.

On January 28, 1983, Foley and his wife executed a guaranty agreement with Virginia National Bank (succeeded by Sovran Bank) N.A. ("Sovran")), in which they assumed liability as guarantors on any loan made to Fairfax Associates up to a maximum of $221,500. On September 4, 1984, Fairfax Associates borrowed funds from Sovran. The loan was evidenced by a commercial note, and made subject to the Foleys' previous guaranty.

In the fall of 1984, Fairfax Associates was insolvent, had no operations, no funds or assets, and no conceivable ability to pay off its debts. Zimpel and Silverstein had each returned to the partnership whatever funds had been received by them and contributed substantial additional funds to pay partnership debts; however, Foley had refused to do the same, claiming a lack of funds. Fairfax Associates still owed approximately $275,000 to the

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[2] Zimpel and Foley were general partners, each with a forty percent interest. Silverstein was a limited partner with a twenty percent interest. Zimpel was Managing General Partner.

banks and this outstanding debt was having a negative impact on Silverstein's and Zimpel's other credit transactions.

Petitioner, Gary Green – a member of the Bar of this Court – represented Silverstein and Zimpel in legal matters unrelated to Fairfax Associates.[3] At their suggestion, Green offered to accept the two notes guaranteed by Foley as full and complete payment of $10,000 in outstanding legal fees,[4] provided the arrangement could be structured to the satisfaction of their local attorneys and the concerned banks.

On December 31, 1984, Zimpel and Silverstein purchased the Sovran note with a cashier's check in Green's name. The cashier's check was obtained with funds debited by Sovran directly from the personal accounts of Zimpel and Silverstein.[5]

Green received the notes from the bank and later sued Foley in the United States District Court for the District

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[3] Green's legal experience is primarily in the field of civil rights litigation and business strategy. He is not experienced in the area of banking or commercial paper, nor matters involving Virginia law. Affidavit of Gary Green, dated November 28, 1988, Pars. 2, 3, 7, 19; Appendix pp. 130a, *et seq.*, *Infra.* He retained Virginia counsel in connection with this action and relied upon the advice of counsel throughout. Green Aff., Pars. 32-37.

[4] The face value of the notes exceeded the amount due Green in fees; however, the notes were in default and Green believed, correctly, that Foley was insolvent. Green Aff., Par. 17.

[5] On the same day, funds from Zimpel's and Silverstein's personal accounts were placed into the bank account of Fairfax Associates. The funds were later withdrawn from the partnership account and returned to their personal accounts on January 2, 1985. Those funds played *no* role in the purchase of the notes. *See* Gunn Deposition at Appendix pp. 116a-129a, *Infra.*

of Maryland on August 22, 1986.[6] Jurisdiction was based upon diversity of citizenship, 28 U.S.C. §1331.

On or about October 23, 1986, Foley, invoking the provisions of Va. Code §49-25, made demand upon Green to institute suit for the collection of the two notes against the partnership as the principal debtor.[7] In response to this demand, Green filed suit against the partnership and the other guarantors on November 24, 1986 in the Circuit Court of Fairfax County, Virginia.

On Foley's motion for a change of venue, the federal action pending in Maryland against Foley was transferred to the United States District Court for the Eastern District of Virginia on March 5, 1987. The docket was opened in that court on April 13, 1987 and a scheduling order issued on May 1, 1987. Respondent filed his first discovery requests on June 3, 1987.

Green filed a motion for summary judgment on June 11, 1987. Foley filed a cross-motion for summary judgment the following day. In his brief, Foley acknowledged that he was aware that Silverstein and Zimpel had "arranged" the transaction by which the notes were sold to Green.[8]

The district court heard argument on these cross-motions on July 2, 1987. Green's counsel took the occasion to respond – four days early – to Foley's Request For

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[6] Green waited over a year and a half before taking any action to reduce the note to judgment.

[7] Green had no prior knowledge that such an action was required under Virginia law. Green Aff., Par. 36.

[8] Brief In Support Of Defendant's Motion For Summary Judgment, at 2.

Production Of Documents. The response included a letter, dated December 14, 1984, from Green to Silverstein and Zimpel, which set forth the terms of the arrangement by which Silverstein and Zimpel had purchased the notes on Green's behalf. Foley's deposition of Green, scheduled for July 2, 1988, never occurred.

On July 22, 1987, the district court denied the motions of both parties for summary judgment on the Mount Vernon note. The court, nonetheless, dismissed the claim as to the Mount Vernon note, without prejudice, becuase of Green's failure to prosecute the claim in state court as required by the Virginia Notice Statute, Va. Code §49-25 (1986). The court found that Foley had specifically waived that statutory right in the agreement he signed with regard to the Sovran note, however, and granted Green summary judgment on that claim.

On July 29, 1987, Foley filed a Motion To Vacate Summary Judgment and Grant Rehearing And Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In his motion, Foley made three arguments. First, Foley claimed surprise as to the letter of December 14, and argued that the letter created a material issue of fact as to Green's status as a purchaser of the notes. Second, Foley argued that Green's response to Foley's motion should have been considered by the district court to be unopposed. Third, Foley argued that he did not anticipate that Green's counsel would assert that Foley had waived his rights under the Virginia Notice Statute.

On July 31, 1987, Foley's motion was denied on the ground that Foley had failed to establish that he had been unfairly prejudiced; the December 14 letter had no legal impact on or significance with regard to Green's right, as holder, to collect on the notes; and Foley had

cited no authority whatsoever to support his position that the Virginia Notice Statute had not been waived by the express terms of his guaranty agreement for the Sovran note.

Foley filed his appeal with the United States Court of Appeals for the Fourth Circuit on August 18, 1987.

While his appeal was pending, Foley took the deposition of Zimpel as part of the state court action on the Mount Vernon note. Foley later claimed that, during the course of this deposition, he

> determined, for the first time, that the promissory note and guarantee agreement . . . were *not* purchased from the payee bank by Green as Green alleged in his pleadings and motions in the District Court, but rather *paid off* with funds out of the account of Fairfax Associates, Ltd., the principal debtor on the note, by Foley's two partners, Mr. Zimpel and one Alan Silverstein.

Foley immediately requested the Court of Appeals to grant an extension of time within which to file his opening brief or, in the alternative, for a stay or remand due to extraordinary circumstances. Foley argued, in his motion, that Zimpel's testimony established that partnership funds had been used to pay off the notes, that the partnership was therefore discharged of the debt, and that Foley's liability on the guaranty was extinguished. Foley also argued that Green had misrepresented his status as a purchaser before the district court and that the court was "misled" into believing that Green had purchased the notes.

On October 21, 1987, Foley filed with the district court a Motion For Relief From Judgment under Rule 60(b)(3). In this motion, Foley argued that he had just learned in deposition of "misrepresentations" in Green's

pleadings and motions. Foley claimed that these "misrepresentations" had prevented him from asserting a meritorious defense to the suit against him.

On October 22, 1987, the circuit court stayed its briefing schedule pending the district court's consideration of Foley's "new" evidence.

On October 30, 1987, the district court conducted a hearing on Foley's second post-judgment motion. Foley presented excerpts from the Zimpel deposition, the bank records, and a chart purportedly describing the transactions which led to the purchase of the cashier's check in Green's name. After considering the briefs and additional materials submitted by Foley, the district court denied this second post-judgment motion, ruling that there was no evidence of fraud or misrepresentation, that the December 14 letter had no legal impact on the rights of the parties, and that Foley had not raised any facts or legal issues which, even if true, could save Foley from judgment.

Foley appealed the denial of this second post-judgment motion on November 6, 1987.

The two appeals were consolidated by the Court of Appeals on November 30, 1987.

Following oral argument, counsel for respondent wrote to the Court of Appeals, providing a portion of the Zimpel deposition. The deposition transcript was not part of the original record on appeal; however, the Circuit Court treated the letter as a motion to supplement the record, and granted it *sua sponte* and *ex parte*.[9]

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[9] Slip Op. at 8, n.6, Appendix p. 15a, *infra*. While the action was pending in the court of appeals, Foley took the deposition of Alan Silverstein and Sovran's commercial loan officer, David

[footnote continued]

In its September 13, 1988 decision, the United States Court of Appeals for the Fourth Circuit reversed the district court. Relying substantially on material submitted after the record was closed on Petitioner's successful motion for summary judgment, the Court of Appeals ruled that Green had defrauded the trial court by withholding evidence and misrepresenting the nature of the transaction by which the notes had been assigned to him. It concluded that the money to purchase the Sovran note had been supplied *via* the partnership account and that Foley, therefore, had a meritorious defense to Green's claim on the ground that the note had been extinguished. It concluded, in the alternative, that the note was extinguished because it had been paid by its "makers" (Zimpel and Silverstein). And it concluded that Green had "no intention" of disclosing the "true" manner in which he obtained the notes. The court instructed the district court to enter judgment for Foley. Circuit Judge Murnaghan thereafter sent a letter to the Disciplinary Board of the Pennsylvania State Bar, calling its attention to what he regarded as Green's professional misconduct. Appendix p. 102a-103a, *infra*.

On September 27, 1988, Green filed a Petition for Rehearing, Suggestion For Rehearing In Banc, And Motion To Supplement The Appellate Record. The Petition asked the court to reconsider the entry of judgment against Green, to permit him to offer evidence explaining the transaction, and why he had not committed fraud.

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Gunn. Despite the fact that those depositions contradicted Respondent's representations of the "facts" based upon the Zimpel deposition, Respondent took no action to bring them to the attention of the court of appeals and petitioner's success on his motion for summary judgment precluded their introduction by him.

The Petition was denied on October 14, 1988. The circuit court denied Green's request for a stay of its mandate on October 19, 1988.

Green then sought a stay of the circuit court's decision from Chief Justice Rehnquist. The application for a stay was denied by the Chief Justice on October 25, 1988.

The district court entered summary judgment for Foley on October 28, 1988.[10]

## REASONS FOR GRANTING THE WRIT

The decision of the fourth circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The court of appeals directed the district court to enter summary judgment against Green on the basis of an affirmative defense raised by Foley after summary judgment had been entered for Green. That affirmative defense had been summarily rejected by the district court without opening the record to permit Green to submit contradictory evidence. The court of appeals thus denied

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[10] On November 14, 1988, Respondent renewed his Motion For Rule 11 Sanctions prematurely filed on September 23, 1988. Respondent requested the district court to award $41,966.25 in fees and $4,567.43 in costs associated with the defense of this case, $28,895.25 in fees and $3,544.23 in costs associated with his defense of the case in state court, plus whatever other sanctions the court may deem just under the circumstances. On December 2, 1988, the district court awarded Foley $20,000 in sanctions against Green. On the same date, Petitioner's motion for relief from judgment was denied. Appendix p. 238a-239a, *infra*. Both parties have filed Notice of Appeal, Appendix pp. 240a, 244a, *infra*.

Green his constitutional right to be heard on the merits and to present any evidence in opposition to a resulting motion for Rule 11 sanctions against him. The decision of the court of appeals is contrary to numerous decisions by this Court holding such orders to be worthy of *certiorari* and uniformly subject to reversal.

The case before the fourth circuit was relatively straightforward. Green had obtained summary judgment against Foley based upon *pro forma* proof that he was a holder of the Sovran note under Virginia law.[11] The district court had also denied two post-judgment motions to open the judgment in order to consider Foley's claim that "new" evidence obtained in a related proceeding in state court demonstrated that Foley's obligation was discharged by Virginia Code sec. 8.3-603; and that he had been precluded from asserting this defense in a timely fashion because Green allegedly failed to plead and to provide evidence of facts which would have alerted Foley to the availability of an affirmative defense. The principal question on appeal, therefore, was whether the district court should have considered the merits of the issues raised in Foley's post-judgment assertion of an affirmative defense.

Inclined as it evidently was to grant relief, the appropriate procedure for the court of appeals to have followed was to remand the action to the district court for a hearing on the merits. This would have involved a determination of whether partnership funds had been used to purchase the note or whether Zimpel and Silverstein had intended to retire the Sovran debt, as Foley asserted on appeal; and, to reconsider its previous decision based upon those findings of fact. This is precisely the relief

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[11] Appendix pp. 104a, 106a, *infra*.

Foley sought; and it had the additional virtue of recognizing the time honored notion that evidence offered by one party is not necessarily conclusive – particularly in the absence of an opportunity for the opposing party to confront that evidence and to present his own contradictory evidence.[12]

Instead, the court of appeals violated a number of the most fundamental principles of civil procedure. First, it permitted the Record below to be irregularly "supplemented" in order to place before it the additional evidence proferred by Foley. It did so, at least in part, *sua sponte* and *ex parte*, without offering Green any notice or opportunity to comment. It then assumed the responsibility of a trial court, determining "facts" and drawing inferences based upon those "facts"; inferences which, contrary to principles learned in first year civil procecure, were viewed – in the context of summary judgment – in the light most *un*favorable to the opposing party.[13] The court then concluded that Green had engaged in a conspiracy to defraud Foley and the court; excoriated him for what it regarded as professional misconduct; and not

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[12] Indeed the court of appeals should have been particularly sensitive to the requirements of due process where the principal evidence upon which Foley relied was a *partial* transcript of the deposition of a witness who, at the time, was a defendant in an action brought by Green.

[13] Green was found by the court of appeals to be "part of a scheme [involving] Foley's business partners," Slip Op. at 2, p. 4a, *infra.*; a "Philadelphia lawyer" engaged in "sharp" practices, Slip Op. at 7, n.4, p. 13a, *infra.*; who "had no intention of disclosing the true manner in which he obtained the notes . . . ," Slip Op. at 9, p. 17a, *Infra.*; and "left his erstwhile clients exposed to double indemnity . . . ." Slip Op. at 6, n.2, p. 12a, *Infra. But see* Green Aff. at Pars. 38, 39.

only granted the requested relief from judgment, but directed that summary judgment be entered for Foley. Then – for good measure – it took steps to set in motion a disciplinary proceeding before the Pennsylvania Supreme Court, thereby jeopardizing not only Green's professional reputation, but his livelihood, as well. And it did all of this with full knowledge of the fact that Green was never provided an evidentiary hearing on the merits of Foley's post-judgment allegations.

Such conduct on the part of an appellate court runs so counter to principles of fundamental fairness that this Court has, in the past, seen fit – on circumstances far less egregious – to assert its supervisory power by granting *certiorari* and reversing the judgment of the appellate court.

Thus, in *Fountain v. Filsen*, 336 U.S. 681 (1949), this Court held it error for the circuit court to enter summary judgment against the party which prevailed below where "the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." 336 U.S. at 683. The Court cited its previous decision in *Globe Liquor Co. v. San Ramon*, 332 U.S. 571 (1948), where it had held that judgment n.o.v. could not be given in the appellate court in favor of a party who was unsuccessful at the trial level. The Court noted that one reason for that holding was that "otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the Appellate Court discovered in his case." 336 U.S. at 683.

Similarly, in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), this Court reversed the order of an appellate court directing that judgment be

entered for a defendant on the basis of a defense which had been stricken by the district court below, noting:

> The direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of his constitutional right to a jury trial on a practical issue.

356 U.S. at 532.

In *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963), the Court warned appellate courts against admitting,

> contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objection. To assume the admissibility of the evidence under these circumstances would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary.

373 U.S. at 156.

And, in *Singleton v. Wulff*, 428 U.S. 106 (1976), the Court repeated the general rule that "a federal appellate court does not consider an issue not passed upon below." 428 U.S. at 120. This rule is,

> essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

428 U.S. at 120, *quoting Hermel v. Helvering*, 312 U.S. 552 (1941).

All of these cases recognize that a litigant's Seventh Amendment right to a civil trial and Fifth Amendment right to due process are completely undermined by appellate decisions which reverse the result below under circumstances in which the party prevailing below was precluded – by its very success – from presenting its case on the merits.

Though reviewed and corrected by this Court, none of these cases involved the kind of damage to liberty and property interests which are the direct result of the fourth circuit's decision in this case. For, in addition to having lost his cause of action on the note, Green has been assessed $20,000 in Rule 11 sanctions on the ground that the findings of the court of appeals are conclusive. He also faces disciplinary proceedings before the Disciplinary Board of the Pennsylvania Supreme Court; proceedings which were instigated by a personal letter from Circuit Judge Murnaghan accompanied with a complimentary copy of his opinion, in which the decision of the court of appeals will constitute the principal, if not conclusive, evidence against him. If the fourth circuit's decision is allowed to stand, Green will simply *never* have had the opportunity to confront, cross-examine, or rebut the witnesses and the evidence against him. He will have been tried, convicted, and literally hung without ever having been heard in his own defense. Such a result cannot possibly do justice to the fundamental notions of due process upon which our system of justice rests. *See, e.g., Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Illinois Central R. Co.*, 291 U.S. 457 (1934); *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915).

Foley's affirmative defense can be viewed as "iron clad", Slip Op. at 4, p. 8a, *Infra.*, only because Green was deprived of the opportunity to introduce evidence to contradict it. Based on a partial transcript of the deposition testimony of an adverse witness in another proceeding and the assertions of Foley's counsel; acting on its own negative inferences drawn from an incomplete record; and in the absence of supportive findings by the district court below, the fourth circuit rushed to judgment and committed a gross injustice.

A full reading of the Zimpel deposition – not merely that *portion* provided by the court of appeals – demonstrates that Zimpel had no appreciation for the terms of art applicable to commercial paper and no real understanding of what occurred on that fateful 31st of December. Silverstein, who arranged the transaction with the bank, testified later that there was no intention to retire the Sovran note.[14] *See, e.g.* Silverstein Deposition at p. 110a-114a, *Infra.* Sovran's commercial loan officer testified that the money used to purchase the cashier's check on Green's behalf was debited by the bank directly from the personal accounts of Zimpel and Silverstein and, contrary to Zimpel's testimony, was never in the partnership account.[15] Gunn Deposition at pp. 117a-129a, *Infra.*

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[14] In view of the extraordinary nature of the action of the court of appeals, Petitioner believes it has no alternative but to request the Court to grant Petitioner leaves to supplement the Record in order to provide the Court with additional material information beyond the Record developed below, contained in pages 108a-245a of the Appendix.

[15] Absent discovery on these matters, the extent to which Green himself was in the dark as to what transpired in the transaction between Zimpel and Silverstein and Sovran is evidenced by the fact that he argued, on appeal, that the deposit about which Zimpel testified was a mistake, not that the funds deposited in the partnership account had been irrelevant to the transaction.

Petitioner firmly believes that the fourth circuit was completely wrong in its conclusion that the note was purchased with partnership funds, that Zimpel and Silverstein intended to retire the debt, that the debt had been paid by its makers,[16] and that there was an intent to withhold information from the district court.[17] A trial court may or may not have agreed. But Green was entitled, at the very least, to have those issues treated as issues of material fact in dispute and to have an opportunity to present evidence to rebut the evidence and argument of the Respondent. The denial of that opportunity deprived Green of his constitutional right to an evidentiary hearing before a fair and impartial tribunal, in violation of the Fifth and Seventh Amendments to the Constitution of the United States and the clear, consistent and unambiguous decisions of this Court.

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[16] In its haste, the court treated Silverstein and Zimpel as "makers" when, in fact, the partnership was the maker. Virginia law makes the partnership a separate and distinct legal entity. Va. Code Ann. sec. 50-8.1.

[17] Green's draft of his response to Foley's discovery was mailed by Green to his attorney on June 19, 1987. Not only was a document detailing the transaction included among the documents to be provided, it was also referenced throughout the interrogatory responses. The fourth circuit's inference that Green intended to withhold this evidence, drawn from the timing of its production and from what it perceived to be an "admission" by Green's counsel below, is completely erroneous, and without support in the factual record. Green responded to Foley's discovery request before oral argument on the cross-motions for summary judgment and several days *before* the due date.

## CONCLUSION

For these various reasons, this petition for *certiorari* should be granted. The matter should be remanded to the district court for appropriate disposition, after a full development of the facts related to Respondent's affirmative defense and claim that Petitioner intentionally withheld material evidence.

Respectfully submitted,

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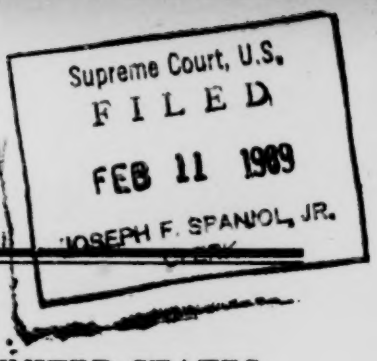


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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

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No. 87-2639
No. 87-2685

---

Gary Green,

Plaintiff - Appellee,

v.

Maurice P. Foley,

Defendant - Appellant.

---

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Upon consideration of the motion to supplement the appellate record,

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Winter and Judge Sprouse.

For the Court

/s/ John M. Greacen,
Clerk

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

---

No. 87-2639

---

GARY GREEN,

Plaintiff-Appellee,

versus

MAURICE P. FOLEY,

Defendant-Appellant.

---

No. 87-2685

---

GARY GREEN,

Plaintiff-Appellee,

versus

MAURICE P. FOLEY,

Defendant-Appellant.

---

Appeal from the United States District Court for the Eastern District of

Virginia, at Alexandria. Albert V. Bryan, Jr., Chief Judge. (CA-87-350).

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Argued: July 5, 1988

Decided: September 13, 1988

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Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges.

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John Raymond Hartnett (BRINCEFIELD & ASSOCIATES, P.C. on brief) for Appellant. Lawrence Eliot Freedman for Appellee.

MURNAGHAN, Circuit Judge:

The appellee, Gary Green, tries to portray the case as involving an ordinary commercial transaction in which a guarantor (appellant Maurice P. Foley) is simply trying to duck liability on a note. The attempted characterization is far from accurate. In fact, Green has been part of a

scheme with two of Foley's business partners (Alan Silverstein and Stephen M. Zimpel), in which the two partners have paid off $291,647.81 in partnership indebtedness and caused the uncancelled notes to be given to Green. Green subsequently has tried to collect the face value of the notes from Foley, the third partner in the partnership, who signed the partnership notes as a guarantor.

Green repeatedly has stated in his court pleadings and arguments that he was a bona fide purchaser of the notes for value. Green claims he took the notes for value because Silverstein and Zimpel owed him $10,000 in legal fees for services unrelated to the partnership. Green has further claimed that the notes were properly discounted from their face value of nearly $300,000 because Green assumed the risk that Foley would be unable to make

good on the guaranty.

Green is, in fact, far from a innocent holder of the notes, however. Foley discovered the true nature of the transaction between his partners and Green only after the hearing on the cross-motions for summary judgment. Foley's lawyer received, as part of discovery, the letter outlining the arrangement between Green and Foley's partners only on the morning the motion for summary judgment was being argued (he received the material after arriving in the courtroom and did not read the papers until after the hearing); he then examined Zimpel in a deposition and discovered the true nature and extent of the transaction. Until Foley obtained the letter outlining the actual agreement between Green and Foley's partners, Foley had no way of knowing that the money used to "purchase" the notes from the banks was

actually money supplied by Zimpel and Silverstein. And until Foley's attorney questioned Zimpel in a deposition, he had no way of knowing that the money used was first put into the partnership bank account in order to retire the notes and was then withdrawn.

Meanwhile, summary judgment had been granted to Green on his claim. Foley sought relief under Fed. R. Civ. P. 60(b)(3), but the district judge ruled that the letter was "neither newly discovered evidence or fraud that would warrant any relief from the judgement."[1] We

---

[1] "Newly discovered evidence" is, of course, a separate reason contained in Fed. R. Civ. P. 60(b)(2) for granting relief from judgment when the discovery is not made, despite due diligence, in time to move for a new trial under Fed. R. Civ. P. 59(b). Foley sought relief only under Rule 60(b)(3), which requires instead fraud, misrepresentation, or other misconduct of an adverse party. However, we note that the fact that evidence exposing misconduct by an adverse party was newly discovered after judgment

disagree.

The new evidence about Green's relationship with Foley's partners reveals the silk purse and sow's ear characteristic of transaction. The belated disclosure that Foley's partners supplied the money (via the partnership account) to pay Sovran Bank gives Foley a meritorious defense to Green's claim. As discussed more fully below, under Virginia law, the note held by Sovran Bank was extinguished because it was paid with partnership funds. See Va. Code Ann. § 50-8 (1986). Even if the money had not gone through the partnership account, the note would have been extinguished because it was paid by its makers (Zimpel and Silverstein). Whitehead v. Planters Bank & Trust Co., 180 Va. 76, 21

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despite due diligence obviously should have a significant impact on the court's evaluation of whether relief from judgment under Rule 60(b)(3) is warranted.

S.E.2d 724 (1942).

Because the newly discovered evidence corrects material misrepresentations in Green's pleadings and gives Foley an iron-clad defense of payment, we conclude that the district court abused its discretion in denying relief from summary judgment under Fed. R. Civ. P. 60(b)(3). We therefore reverse the remand in order that summary judgment may be entered for Foley, as there are no material disputed facts remaining.

I.

Foley, Zimpel, and Silverstein were partners in Fairfax Associates, Ltd. ("the partnership"). Zimpel and Foley were general partners, each with a 40% interest, and Silverstein was a limited partners with a 20% interest. Zimpel was Managing General Partner.

The partnership executed notes with

two banks. In 1982, Foley and Zimpel signed a note on behalf of the partnership for $7,800,000.00 to secure a loan from Mount Vernon Savings & Loan Association. Mount Vernon's successor is Crossland Savings Bank ("Crossland"). Foley, Zimpel, and their spouses executed a guaranty agreement promising to make good on the Crossland note.

On January 28, 1983, Foley and his wife executed a guaranty agreement with Virginia National Bank (successor: Sovran Bank) promising to make good on any loan made to the partnership up to $221,500. On September 4, 1984, Zimpel executed a note on behalf of the partnership to Virginia National Bank to secure a loan for $260,000, with payment due December 3, 1984. An additional $40,000 loan seems to have been made by Sovran Bank to the partnership; that loan was guaranteed by

Zimpel and Silverstein but not by Foley.

Gary Green provided legal counsel to Zimpel and Silverstein in matters unrelated to the partnership. For that representation, Zimpel and Silverstein owed Green $10,000. On December 14, 1984, Green sent a letter to Silverstein and Zimpel detailing their agreement regarding satisfaction of the $10,000 debt through assignment or purchase in Green's name of negotiable partnership notes that had been guaranteed by Foley. In the letter (reproduced as an appendix to this opinion), Green noted that Silverstein and Zimpel "offered to buy the notes and guarantees from the banks in my name in order to free up your lines of credit on the one hand, and to pay your debt to me on the other." Outlining their agreement, the letter provided that Zimpel and Silverstein would "purchase in or have assigned to [Green's]

name" certain notes guaranteed by Foley with a net amount due in excess of $275,000. The notes and guarantees were not to be marked cancelled, and Zimpel and Silverstein were to pay the "costs of acquiring the notes and guarantees and of enforcing them," unless Green elected to assume the costs of enforcement. Green was to receive anything collected on the notes and guarantees without regard to whether Foley could successfully pursue Zimpel and Silverstein for contribution or other claims involving the partnership or the notes: "In other words," Green concluded, "I will retain whatever I recover from Foley without regard to what occurs between you and Foley."[2]

On December 31, 1984, Zimpel depos-

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[2] Green thus left is erstwhile clients exposed to double liability on the notes, a highly questionable act by an attorney whether or not Zimpel and Silverstein fully perceived their peril.

ited $219,256.42 of his own funds into the partnership bank account. The same day, Silverstein deposited $93,967.05 of his own funds into the partnership account. Zimpel testified in his deposition,[3] "Alan Silverstein and I deposited the money from our personal accounts into Fairfax Associates account in preparation for retiring debts of Fairfax Associates. We subsequently had discussions with our counsel in Philadelphia[4]... Mr. Green... And subsequently took the money back out of the Fairfax Associates and proceeded in

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[3] Zimpel's deposition was taken October 6, 1987 (three months after the summary judgment hearing in the present case), in connection with Green v. Stephen Zimpel, Marilyn Zimpel, & Fairfax Associates, Ltd. (Law No. 76682), a related case in the Fairfax County Circuit Court in Virginia. See infra at 11.

[4] The deserved reputation of Philadelphia lawyers for astuteness has hardly manifested itself here. The activities have been sharp rather than astute.

another manner."

The same day, December 31, 1984, Zimpel and Silverstein took the money (totalling $313,223.47) out of the partnership account, put it back in their personal accounts, and then purchased a cashier's check for that amount in Gary Green's name. Green used the $313,223.47 cashier's check to purchase the partnership's notes from Sovran Bank. In his complaint in the instant case, however, Green merely asserted:

> Plaintiff stands in the shoes of the bank. Plaintiff was a bona fide purchaser of the notes for value from the payees and holders of the notes. Defendant Maurice P. Foley owes to Plaintiff the amount of said note and interest

In the memorandum supporting his motion for summary judgment, Green said,

> In January, 1985 and February, 1985, Plaintiff Gary Green purchased the MOUNT VERNON NOTE

> from Crossland Savings Bank...by paying $31,647.81....
>
> In February, 1985, Plaintiff purchased the SOVRAN NOTE for a purchase price of $260,000.

In a sworn affidavit on June 4, 1987, Green stated that he had "acquired all of the rights" to the Crossland and Sovran notes, "upon the payment" of $31,647.81 and $260,000 respectively. Thus, until he received a copy of the December 14 letter and took Zimpel's deposition, Foley did not know that the funds used by Green to "purchase" the notes from the two banks had been provided by Foley's partners, and that at least some of the money (the money used to purchase the Sovran notes) had passed through the partnership account.[5]

---

[5] The source of the funds used to purchase the Crossland note and the fate of the second Sovran note (for $40,000) are not clear from the record. It appears that Zimpel and Silverstein were the source of all monies used to pay the partnership's notes, and it appears likely

Foley knew nothing of the December 14 letter until after the July 2, 1987 district court hearing on the parties' cross-motions for summary judgment. Foley's counsel received the discovery material after he arrived in the courtroom for the hearing, and did not read the letter until after the hearing. In his brief to this Court, Green asserts that Foley's counsel "was served with a timely Response to Foley's Request for Production of Documents." Green's assertion that the letter was produced in a timely fashion is seriously undermined by the statement made by his attorney:[6]

---

that one of them took custody of the smaller Sovran note (which had not been guaranteed by Foley). We need not be concerned with such factual uncertainties, however, because the two notes are not at issue in the present appeal.

[6] The attorney's statement was made during the Zimpel deposition, which was taken in connection with a related case in Fairfax County Circuit Court. See supra

> I'll tell you frankly that the reason the letter was produced was because I in error allowed it to be produced, and having let the cat out of the bag it was gone and there was nothing else I could do about it. I've had to live with it ever since.

It is thus apparent that Green had no intention of disclosing the true manner in which he obtained the notes and correcting the misrepresentations in his pleadings.

On October 6, 1987, Foley's counsel took Zimpel's deposition and questioned him about the transaction with Green and the December 14, 1984 letter. The deposition for the first time revealed the full nature of the transaction between Green and Foley's partners. In his deposition, Zimpel testified in part:

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note 3. This portion of the deposition transcript was not part of the original record on appeal. It was, however, attached to a letter sent by counsel after oral argument. We have treated the letter as a motion to supplement the record and hereby grant the motion.

A. The transaction of depositing the money into Fairfax Associates was in preparation for curtailing that debt... Alan and myself were feeling very wrong that we were curtailing, the two of us were curtailing debts of the partnership that were the responsibility of all three partners and not just two partners. It was in a discussion of that particular feeling of Mr. Foley's lack of participation and responsibility for the debts of Fairfax Associates that we were discussing with Mr. Green, our Philadelphia attorney, when he reminded us of a --

[interruption by counsel, who noted that substance of conversation was privileged]

Q. Why does Gary Green's name appear on the cashier's check?

. . .

A. Mr. Green was retiring the debt... Mr. Green was receiving the note in return for fees and services that we owed to him, our feeling being that at the time that Mr. Foley was not going to participate, that he probably didn't have any assets, and for us to pursue Mr. Foley would be an expense on top of already tremendous expenses, and by being able to curtail the debt with the payoff of that note we felt like at that time we were coming out of a bad situation a little bit better allowing Mr.

Green to pursue that note.

. . .

[conferred with counsel]

A. The cashier's check for the $313,223.47 represents the retirement of the debt of Fairfax Associates with Sovran Bank. The note for that debt was used to retire our debt with Mr. Green.

[lawyers discussed use of word "retire"; Zimpel was asked what he meant in context; Zimpel conferred with counsel and stated:]

A. I mean the paying off of the debt, not the cancelling of the note.

Q. Well, the note in fact was never cancelled, was it?

A. No.

Q. And one of the reasons it was not cancelled was because you instructed Sovran Bank specifically not to cancel the note; isn't that correct?

[question repeated]

A. Yes, that's correct.

On August 22, 1986, Green sued the Foleys[7] in the District Court of Maryland

---

[7] Mrs. Foley was dropped from the suit at an early stage.

on their guaranties on the $260,000 Sovran note ($221,500 guaranteed by the Foleys) and the $31,647.81 Crossland note (fully guaranteed by the Foleys and the Zimpels). The claim was for the full amount guaranteed, not merely the 40% obligation of Foley as a partner. Foley's motion for a change of venue to the Eastern District of Virginia was granted. In October, 1986, Foley demanded that Green institute suit against the partnership, as the principal debtor, for collection of the two notes. Pursuant to Va. Code Ann. § § 49-25 & 49-26 (1986), Green filed suit against the partnership and the other guarantors in Fairfax County Circuit Court. Green v. Stephen Zimpel, Marilyn Zimpel, & Fairfax Associates, Ltd. (Law No. 76682). Although he was a necessary party, Foley was neither named in the Fairfax suit nor notified of its existence.

Foley argued below that he was entitled to summary judgment on both counts because Green did not diligently pursue the suit in the Fairfax court, as required by Virginia law. See Va. Code Ann. § 49-26 (1986) (after demand by surety, if creditor does not institute suit against solvent parties to contract "and prosecute the same with due diligence," creditor forfeits right to demand payment from surety). The district court dismissed the Crossland note claim because Green had failed to prosecute the Fairfax suit with diligence (no discovery had yet been taken, for example). Green has not appealed that ruling. However, the district court found that Foley had specifically waived that statutory right in the guaranty he signed on the Sovran note. The district court then granted Green summary judgment on the Sovran note claim.

Foley filed a Motion for Reconsideration/Motion to Vacate pursuant to Fed. R. Civ. P.59(e) based on unfair prejudice due to Green's untimely filing and service of his Response to Foley's Motion for Summary Judgment; the motion was denied. Foley then filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(3), alleging that material misrepresentations contained in Green's pleadings and motions prevented Foley from presenting a meritorious defense of payment before the entry of summary judgment. After a hearing, that motion was also denied. Foley now appeals the denial of both motions.

II.

To obtain relief under Fed. R. Civ. P. 60(b)(3), the movant must (1) have a meritorious defense, (2) that he was prevented from fully presenting before judg-

ment, (3) because of the adverse party's fraud, misrepresentation, or misconduct. Square Construction Co. v. Washington Metropolitan Area Transit Auth., 657 F.2d 68, 71 (4tb Cir. 1981). In considering those requirements, "the court must balance the competing policies favoring the finality of judgments and justice being done in view of all the facts." Id.

The standard of review for denial of relief under Rule 60(b) is abuse of discretion by the district judge. United States v. Williams, 674 F.2d 310, 312 (4th Cir. 1982); Central Operation Co. v. Utility Workers of America, 491 F.2d 245, 252 (4th Cir. 1974); 11 Wright & Miller, Federal Practice and Procedures §2872 (1973). The district judge concluded here that the letter and deposition were "neither newly discovered evidence or fraud that would warrant any relief from the judgment that

is requested. This is evidence that was known or could easily have been determined with due diligence at the time of the original hearing." We disagree.

A.

Armed with the Green letter and the Zimpel deposition, Foley had a meritorious defense of payment. The Virginia Supreme Court has stated:

> "The transfer of a note to the maker or a bill to the acceptor, at or after maturity, extinguishes the instrument; likewise, the payment of a note by the maker...at or after maturity, extinguishes the instrument; after such transfer or payment, the instrument cannot be reissued so as to confer any rights upon the transferee as against a party who had nothing to do with the reissuance. One who thereafter takes the instrument takes subject to the defense of payment. There can be no recovery against an accommodation maker or a surety. The maker cannot reissue the note so as to render an endorser liable to a subsequent holder. Even though the maker has the note endorsed by the payee and transferred to a third person, such

> person cannot recover of an accommodation maker. * * *"

Whitehead v. Planters Bank & Trust Co., 180 Va. 76, 81-82, 21 S.E.2d 724, 727 (1942) (emphasis added) (quoting a commentator). See Grizzle v. Fletcher, 127 Va. 663, 667, 105 S.E. 457, 458 (1920) ("A person cannot buy his own debt without extinguishing it. Of course, the creditor may sell the judgment to a third person, but not to one of the judgment debtors so as to keep it alive at law.").

The Sovran note has been retired, releasing Foley from his role as guarantor, because partnership money was used to pay off the bank. Zimpel and Silverstein put the $313,000 into the partnership account and then withdrew it to purchase the cashier's check in Green's name. Under Virginia law, "All property originally brought into the partnership stock or subsequently acquired, by purchase or

otherwise, on account of the partnership is partnership property." Va. Code Ann. 50-8 (1986). By the terms of the statute, any money intentionally deposited in the partnership account becomes partnership property.

In his Brief to this Court, Green claims that Zimpel and Silverstein made a "mistake" when they put the money into the partnership account, and argues that the money never became partnership property because Zimpel and Silverstein intended "to specifically not extinguish the partnership debt (as would occur if the partnership had the money to pay off its own debt) and to have the entire partnership debt, including the guarantees, assigned to Green." Appellee's Brief at 17 (emphasis original). However, Zimpel testified in his deposition that he and Silverstein put their money into the partnership ac-

count "in preparation for retiring debts of Fairfax Associates":

> A. The transaction of depositing the money into Fairfax Associates was in preparation for curtailing that debt [the Sovran notes].
>
> Q. Meaning it was going to pay the debt off, correct?
>
> A. Yes.

It is thus clear that Zimpel and Silverstein deposited the money with the intent to retire the partnership's debts. The funds, once deposited, therefore became partnership property. Green's assertion that the money was deposited by "mistake" may be correct in that he and his erstwhile clients subsequently regretted the action, but it is clear that inadvertence was not involved at the time the deposit was made.

Even if the funds used to pay Sovran are not deemed by law to be partnership funds, Green acted as an agent for Zimpel

and Silverstein, and retired the debt when he paid the banks for the partnership's notes. Green is correct in arguing that the intention of the party making the payment is controlling, but only where the payor is a third party to the debt. See Union Trust Corp. v. Fugate, 172 Va. 82, 89, 200 S.E. 624, 627 (1939) ("Whether payment by a third person operates as a discharge of the instrument, or as a purchase vesting title in the payor, depends on the payor's intention."). Here, the payment was made by the makers of the note. As partners, Zimpel and Silverstein and Foley are jointly liable for all debts and obligations of the partnership. Va. Code Ann. §50-15(b) (1986).

In addition, when one partner acts within his authority, his actions are actions of the partnership and bind the partnership. Va. Code Ann. §50-9 (1986)

(*[e]very partner is an agent of the partnership for the purpose of its business"); Holloway v. Smith, 197 Va. 334, 88 S.E.2d 909 (1955). Even though the cashier's check was in Green's name, Zimpel and Silverstein controlled the transaction and instructed the bank with regard to disposing of the notes. Zimpel testified in his deposition that he had instructed Sovran Bank not to cancel the $260,000 note. And, it appears that Zimpel or Silverstein took possession of the smaller Sovran note, even though it had ostensibly been "purchase" from Sovran by Green. See supra note 5. It all adds up to the type of sham transaction that releases the surety under Whitehead v. Planters Bank & Trust Co., supra.

It is patently obvious from the record that the misrepresentations in Green's pleadings and the fact that Foley received

the December 14 letter the morning of the summary judgment hearing combined to prevent Foley from presenting the meritorious defense of payment to the district court in a timely fashion. In his pleadings Green consistently and materially misrepresented his status as a holder of the notes, claiming that he was a "bona fide purchaser of the notes for value." Green thus asserted that he had bought the notes from the banks, when in fact the money was supplied by Foley's partners via the partnership account. Until Foley got the December 14 letter he had no way of knowing that Green had obtained the notes in anything other than an ordinary arms-length transaction with the banks.

If Green had simply purchased the notes from the banks himself, the district court's conclusion that Foley was liable, as a guarantor, to Green as a holder in

due course of the Sovran note would have been entirely correct once the district judge ruled that Foley had waived his right to require Green to pursue the principals on the Sovran note. In fact, however, it is now clear that the notes were retired with partnership funds or, at a minimum, that Green was merely an agent for Zimpel and Silverstein, whose payments retired the notes.

Faced with the clear and uncontroverted record, we are forced to conclude that the district court's finding that no fraud was present is clearly erroneous, and that the district court abused its discretion in denying Foley relief under Fed. R. Civ. P. 60(b)(3). Green's failure to disclose the true nature of the transaction between himself and Foley's partners and the banks holding the notes "struck at the very heart of the fact

finding process" that is entrusted to the district court. Square Construction Co. v. Washington Metropolitan Area Transit Auth., 657 F.2d 68, 72 (4th Cir. 1981). As we concluded in Square Construction, we conclude here that "the policy of deterring misconduct which threatens the fairness and integrity of the fact finding process must outweigh considerations of finality." Id. (citing Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978)). Any other result would reward Green's wrongful acts by permitting him to retain the benefit of those acts, at Foley's expense and in derogation of the proper function of the federal courts.

III.

Foley also appeals the denial of relief under Fed. R. Civ. P. 59(e), complaining that he was unfairly prejudiced by Green's late filing of a response to

Foley's motion for summary judgment. Because of our conclusion that Foley is entitled to relief from judgment under Fed. R. Civ. P. 60(b)(3), we deem it unnecessary to reach the issue.

IV.

The question not being before us, we are not required to investigate any claims that Zimpel and Silverstein may have against Foley for his share as a partner of the partnership's indebtedness to Sovran Bank.

V.

The order of the district court denying Foley relief under Fed. R. Civ. P. 60(b)(3) is vacated. We remand the case to the district court with instructions to enter summary judgment for Foley on the Sovran note claim, as there are no material facts in dispute and Foley is entitled to judgment as a matter of law.

VACATED AND REMANDED.

**APPENDIX TO OPINION**

TEXT OF LETTER REFERRED TO AT PAGE 5

December 14, 1984

Mr. Alan M. Silverstein
Mr. Stephen M. Zimpel
7297 Lee Highway
Falls Church, VA 22042

Re: Silverstein and Zimpel

Dear Alan and Stephen:

I represented the two of you in connection with your acquisition of an interest in DEG. When I met with you in April, we agreed that in addition to my hourly rate, which DEG was to pay, if the deal was consummated [sic], the two of you would pay me or my firm a fee of $10,000.00 for acting as a finder and for collateral services.

On November 28, 1984 I met with you again at your office. During our discussion I raised the question of the $10,000.00, which still had not been paid. You both acknowledged the debt and offered me an alternative payment based on negotiable notes and guarantees signed by a general partner (Foley) in one of your real estate deals. You offered to buy the notes and guarantees from the banks in my name in order to free up your lines of credit on the one hand, and to pay your debt to me on the other. Subject to your

completion of all of the conditions set forth below, I agree to accept the alternative payment.

The conditions are as follows:

1. You will purchase in or have assigned to my name (or the name of my law firm) notes and guarantees signed by Foley (and his wife) from certain banks, including Mount Vernon Savings and Loan as well as Sovran Bank.

2. The notes and guarantees will have a purchase price and a net amount due in a sum in excess of $275,000.

3. The notes and guarantees will not be marked cancelled.

4. The costs of acquiring the notes and guarantees and enforcing them (unless I elect to assume the costs of enforcement) will be paid by you.

5. Anything that is collected on the notes and guarantees will belong to me (or my firm if I so elect).

6. You have represented that the notes and guarantees are valid but that you believe Foley may not have sufficient assets to pay same; therefore, you do not guarantee collection, and that is a risk I will assume.

7. You also represented that Foley had breached his agreements with you and that you have set offs and counterclaims against him. I advised you that you will not be given credit for the payments made to acquire the notes and guarantees be-

cause I will be the legal purchaser. You stated that you would assume the risk of any lawsuit by Foley for contribution and that whatever I recovered from Foley (and/or his wife) would not be subject to a reduction or payment by me to you for any sum Foley might be awarded from a cross claim, lawsuit or other action again you. In other words, I will retain whatever I recover from Foley without regard to what occurs between you and Foley.

8. If you are unable to acquire the notes and guarantees mentioned above by April 1, 1985, or if you do not satisfy the conditions, I will have the option of terminating this agreement, in which event, the said $10,000.00 fee will be paid by you.

If there is anything in this letter which does not accurately describe our agreement, please advise me promptly.

I am grateful for the opportunity you have offered in this innovative fee payment arrangement.

Sincerely,
/s/ Gary Green
GARY GREEN

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

| | | |
|---|---|---|
| GARY GREEN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION |
| | ) | NO. 87-350-A |
| MAURICE P. FOLEY, | ) | |
| | ) | |
| Defendant. | ) | |

O R D E R

The court concluding that the matters set forth in the defendant's motion for relief from judgment do not constitute newly discovered evidence nor fraud within the meaning of F. R. Civ. P. 60(b)(2) or 60(b)(3), it is hereby

ORDERED that the motion of the defendant for relief from judgment entered

in this action on July 22 and July 31, 1987 is denied.

/s/United States District Judge

Alexandria, Virginia
October 30th, 1987

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GARY GREEN,

Plaintiff,

-vs- CIVIL ACTION NO. 87-350-A

MAURICE P. FOLEY, et. al.,

Defendants.

Friday, October 30, 1987
Alexandria, Virginia

Transcript of motion for summary judgment in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge, United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

LAWRENCE FREEDMAN, ESQUIRE
10560 Main Street
Fairfax, Virginia 22030

FOR THE DEFENDANTS:

JOHN HARTNETT, ESQUIRE
BRINCEFIELD ASSOCIATES
526 King Street, Suite 423

Alexandria, Virginia 22313

* * *

DON McCOY, RPR
OFFICIAL COURT REPORTER
683-3668

P R O C E E D I N G S

THE CLERK: Civil Action No. 87-350-A, Gary Green versus Maurice P. Foley, et al.

THE COURT: This comes on on the defendants' motion for relief -- this case is on appeal. Do I have any jurisdiction to hear this?

MR. HARTNETT: I believe you do, Your Honor. I think that what the cases show, 60(b)3, is that you have the right to hear this matter, and I think in fact the cases suggest that the Court of original jurisdiction should in the first instance hear the matter. If you are inclined to grant the motion, however, you have to indicate that you are so inclined. Then it would

be --

THE COURT: I have jurisdiction to deny it but not to grant it?

MR. HARTNETT: I believe that is the case ironically, Your Honor, and the way that the methodology -- Your Honor is quite accurate. The methodology employed across the jurisdictions and throughout the circuits is that if you are inclined to grant it, you indicate so on the record and that allows us to make a remand and a remand under those circumstances is pretty automatic.

And then the Court can enter an order in keeping with the expression that's made on the record.

Your Honor, I think that --

THE COURT: Well, let me tell you, I am not inclined to grant it. I think the thing to do is to deny it without prejudice to your right to renew it should the

case be affirmed on appeal. You have met then your time constraints as far as the time within which a 60(b)3 motion should be made. But it seems to me an exercise to go through this in light of what is going on in the future and the pendency.

What is the status of the case in Court of Appeals?

MR. HARTNETT: Your Honor, we have obtained a stay of all proceedings from the Court of Appeals pending this hearing and the results of this hearing. The Court of Appeals has indicated that depending on your ruling here, they obviously, if you deny the ruling, we have an opportunity to appeal that ruling and we would for purposes of including in the record on appeal the Zipple (phonetic) deposition, which was not a part of the original record.

If on the other hand, you agree with

us that this motion ought to be granted, you express that inclination and by virtue of the remand, by virtue of the stay we are allowed to move for a remand, and the Court of Appeals would do so, giving you the ability to enter an order in accordance with the expression.

But if you are inclined to simply deny the motion based on jurisdictional grounds, I would like to make a proffer.

THE COURT: No. I think I have jurisdiction to deny it. I don't think I have jurisdiction to grant it. I am not inclined to grant it. But -- part of that is that I think the resolution by the Court of Appeals may assist me --

MR. HARTNETT: Unfortunately, the cases go the other way as far as what is supposed to be done in a 60(b)3 when there is an appeal pending. I would point out that this Zipple deposition is very re-

cent. Had we been aware of it at a point in time prior to filing the notice of appeal we certainly would have let the Court know.

However, Your Honor, in all the cases that I researched, the proper procedure for the 60(b)3 and I think I have quoted several cases in the memorandum, that indicate that in the first instance, in a situation where there is an appeal pending, the procedure that we are today following is the proper one. We agree with you that you don't have jurisdiction today to grant an order. And the procedure is that the expression be put on the record.

If I might, Your Honor, I think I see where you are going. If I could make a proffer here simply for the record. I think that the facts themselves are really not in dispute. What we have subsequent

to the judgment in this case, there was a summary judgment entered by you, Your Honor. What we have learned is that partnership funds and not Mr. Green's funds were used to pay off the note that is sued upon in this case. The background generally is that my client Foley was partners with two other individuals, Mr. Zipple and Silverstein (phonetic). They had a partnership known as Fairfax Associates Limited.

A point in time comes when the partners themselves have a falling out. Foley had guaranteed a couple of loans to the partnership, promissory notes where the partnership was the principal debtor. At the point in time when the partners have this falling out and pursuant to the partnership agreement, Mr. Zipple is the managing general partner. Mr. Zipple is a resident of Virginia. The other partner,

Mr. Silverstein and Mr. Zipple have numerous transactions together. They brought Foley into the partnership basically so they would be able to obtain loans using Foley's credit.

Foley was the other general partner. He is a resident of Maryland.

They concocted a plan whereby, and they meaning the partners, concocted a plan whereby they are going to attempt to create the appearance of a purchase of one of the notes, a Sovran note, in the amount of some $260,000 plus a second note, Sovran note, for some $40,000.

The second note was not guaranteed by my client, Your Honor. It was guaranteed by Zipple and Silverstein only. The way they do that is they come up with Gary Green, a stranger to the partnership, but he is personal counsel for Zipple and Silverstein. As the exhibit in our memoran-

dum indicates, that's the letter from Green to Zipple and Silverstein, the plan was that Zipple and Silverstein would obtain a cashier's check, use Gary Green's name, and create the appearance of a purchase rather than a payoff so that Green could obtain the $260,000, the Sovran note and then pursue Foley only. Mind you, Foley was only a guarantor on that note.

Now, I have prepared, Your Honor, a chart of transactions which again for record purposes I would like to hand up to the Court. I think that it kind of explains the complicated fact pattern, where the money moved to and -- here's a copy for counsel.

MR. FREEDMAN: Just for the record, I would object to the use of this. It is a mischaracterization, but I will get to that in argument.

MR. HARTNETT: This conforms, I be-

lieve, with the testimony of Mr. Zipple at his recent deposition. I have in alphabetical order lettered the way that money moved here. If you will see in transaction A on the right-hand side of the chart, Zipple testified that he and Silverstein put together $313,000 into the partnership account, two separate checks. Your Honor, I would also like to hand up to you copies of the Fairfax Associates' checking account that indicates those deposits. That's transaction -- that's the only copy I have.

Your Honor, what you have now is a copy of the Fairfax Associates' bank account. That indicated in the first of those pages a deposit of $313,000 into the Fairfax Associates account in late December, December 31st, to be exact, of 1984.

According to Zipple, those funds came

from himself and Silverstein. I have attached a copy of the Zipple deposition where he says that that money was put into the partnership account to retire the debts owed to Sovran. Retired is his word, not mine.

After consulting with Mr. Green, their personal counsel, you will notice that on the next page, the next page of the bank account information, there are two checks coming out of the partnership account, one in the amount of $219,000 and some hundreds and $93,000. I have underlined those, I believe, Your Honor.

That money went into the personal accounts respectively of Messrs. Zipple and Silverstein. Those funds then were used to purchase a cashier's check in the amount of $313,000 in the name of Gary Green. We have obtained from Sovran Bank the confirmatory data for that. I would

like to hand that up to the Court. It's a copy of the transactions involved. You will note there that what you have are two checks, one from the private account of Alan Silverstein for $93,000 and some change and another from the private account of Mr. Zipple for $219,000 and some change, which together purchased the cashier's check. It's on that page. The cashier's check has on it the name of Gary Green. It was the cashier's check -- and referring again to the chart, Your Honor, we are now at level C, where Zipple and Silverstein use the money which they have taken out of the partnership account to purchase the cashier's check in the name of Green.

They direct, and this again is in Zipple's deposition -- Zipple and Silverstein direct Sovran Bank not to cancel the note. Instead they tell Sovran Bank to

transfer the note without recourse to Gary Green. That's exactly what happened here in Section D. Once the cashier's check is used, Green takes the note and in furtherance of this plan which is first mentioned in the letter from Green to Zipple and Silverstein, he sues Foley and tries to make Foley bound in debt to the partnership on the $260,000 note, the problem being, Your Honor, these are partnership funds, a further problem being Mr. Green doesn't say that in his pleadings. Mr. Green says he paid it. He did no such thing.

Once that money went into the partnership account, it was partnership funds, and neither Messrs. Silverstein or Zipple had any right to take those funds out of the partnership account for any purpose other than a partnership purpose. Clearly that was not the situation here. The

situation was to get Foley. There is only really one of four ways to view this transaction. And again these facts I don't think are disputed. I don't think that counsel for Mr. Green is going to gainsay the facts. It's just a question of the interpretation put on these facts.

It's either a situation where partnership funds were used to pay a partnership debt, and that's what we argue happened here, when you shake everything else out, that is what happened. Because of that, Foley was discharged, and Green never had a right to sue in this case. That's why the 60(b)3 is brought now.

If it's not that, then partnership funds were used to pay off a private debt. In other words, Zipple and Silverstein used these moneys that they took out of the partnership to pay Gary Green off for a $10,000 legal fee, a personal legal fee,

which Zipple and Silverstein owed Green related to a transaction that had absolutely nothing to do with the partnership.

Well, if that's the case, that transaction is void, and the partnership title does not divest. The law across the board in all the circuits and for a very long time says that if partners use partnership property to pay off personal debts, partnership title is not divested. In that case, Green doesn't have any rights under the second scenario either.

The idea that these were somehow personal funds is just preposterous. Looking at Zipple's deposition, he talks about the very intention when the money was put into the partnership account. He makes it very clear that the intent was to retire the partnership debts. It's only after they talked to Green that they come up with this plan to create the appearance of a

purchase by Green rather than the reality which was a payoff of the partnership debt with partnership funds.

Moreover, Your Honor, it wasn't the individual funds for another reason. I mentioned the second promissory note, the note for $40,000. Green didn't get that. In other words, the components of the $313,000 going to the bank, there was a $260,000 note that Green got. There was a $40,00 note. Green doesn't have it, because -- and that was also a partnership note, the difference being that Zipple and Silverstein guaranteed it, not Foley. Zipple and Silverstein as far as I am aware and as far as the bank is aware they have that note, and that was a partnership note so they always meant to pay off debts and that is in fact what they did.

For those reasons, Your Honor, we think that the 60(b)3 is one that is

highly appropriate here and just again renewing the substance of the cases on 60(b)3. When a judgment is obtained through misconduct or misrepresentation of a party which at the time of the misconduct prevents the defendant or the party prejudiced from advancing a meritorious defense, the 60(b)3 motion should be granted, whether it should be granted in this Court or whether in the Court of Appeals. We think it's clear that in this point, when we have representations and Mr. Green's motion for summary judgment, a motion that was granted on summary judgment, that he purchased the notes from the bank. That's just false.

When we have representations in Mr. Green's complaint that he purchased the note for value from the bank and was the holder from the payee, was the holder from the payee on the note. That's just false.

That prejudiced Foley from advancing the clearly meritorious defense of payment and discharge. If the allegations had been true in Green's complaint, if the real facts had been known, this case would have been dismissed up in Baltimore where it was originally brought. But again, Foley was prejudiced by the misrepresentations in his -- complained of here.

Thank you, Your Honor.

MR. FREEDMAN: I would first state I do not agree with either the facts or the characterization of the facts stated by counsel. It just isn't so. What he nicely omits here is that Mr. Silverstein contributed a substantial sum of money as he describes. He was not a general partner. This partnership was not a guarantor of the notes. He is not a signatory of the notes and had no obligation to the partnership.

Admittedly, as the deposition of Zipple shows, the deposition taken in an action out of a suit in Fairfax Circuit Court, one of two actions ongoing between Zipple, Silverstein and Foley, involving the partnership relationship, these notes and everything else, one of them involves Green's suit against the partnership and the general partner of the partnership on the notes that was referred to in Your Honor's ruling when you dismissed one of the counts on one of the notes owned by Green which somehow is not owned by Green. I don't understand that.

But you dismissed that count, granted their summary judgment on the basis that we had not proceeded diligently in the Fairfax Circuit Court, which we now are in the process of doing.

All the parties -- he has intervened on behalf of Foley. All of the parties

are there in Court.

Now, if I may, what is before the Court is the question of whether or not they knew what was going on while this matter was presently pending before this Court, and whether there were any misrepresentations made. I would point out to Your Honor in their original answers, the suit was brought in the United States District Court in Baltimore. At their request on their motion, venue was changed and brought here. It was brought in Maryland because that's where Foley resided in Maryland. He was sued in the Federal District Court because there was diversity of citizenship and the appropriate amount of money involved. They requested it be brought here. They did so on the pretext that they wanted to be able to join in all the parties to it, Zipple, the other general partner and the partner-

ship. But they never did that here. They never brought what amounts to be a compulsory counterclaim if you look at it closely in this Court. Instead they sought to intervene in a suit that was ongoing in Fairfax against the partnership on the note in question.

They have intervened and they have raised all of this issues including counterclaims and cross claims in the Fairfax Circuit Court. It's still ongoing.

In bringing the matter here they have filed a set of interrogatories and request for discovery, production of documents. In their motion for summary judgment and in their response to our motion for summary judgment, they make the same allegations that they did here. They call Mr. Green, my client, a straw man. They say that he didn't really own the notes and so forth. In fact, in answers to the deposi-

tion and in these interrogatories and in the answers to responses to production of documents, we provided a letter which was the letter of representing the agreement between Zipple, Silverstein and Green, as to the acquisition of these notes, the forgiveness of a large legal fee that was owed to Mr. Green in response as part of all this, they had all of that here in the U.S. District Court.

In fact, Your Honor, if you will look at the motion for reconsideration, after you had granted the motion for summary judgment, they include that letter as a specific exhibit and say that this is the transaction that occurred. Your Honor granted or rather ruled as follows as it relates to their motion to reconsider.

Now this has all been before Your Honor before. They had all these facts here before they ever took Zipple's depo-

sition. Your Honor said upon consideration of the motion to vacate summary judgment and after consideration of the brief in support thereof, including those arguments not previously made, which was the matter of the letter, it is hereby ordered the motion to vacate summary judgment is denied. You ruled on it already. It was here before this Court already.

Now in addition to that, Your Honor, they took Mr. Zipple's deposition in the Fairfax suit. Mr. Zipple went right down case and verse and said yes, just as that letter was presented is exactly how this entire transaction took place. And the way it took place was that the funds were put up, is spelled right out in a letter and what was forgiven and what was not.

It's no surprise to anybody. There was no variance, not one iota or as it says in the Bible, not one jot and not one

tittle was changed in the letter of agreement between these parties and in fact what happened. There was nothing new there. He knew about it beforehand. The fact that Zipple got up and said in the deposition, yes, that's how it occurred, doesn't change the fact that we answered in interrogatories and gave them a copy of the letter and said yes, that's how it occurred. So this is not new.

THE COURT: All right.

MR. FREEDMAN: Finally, Your Honor, what they did was deposit some funds into the partnership account and took them back out again and put them back into their own account. Mr. Zipple went through in his deposition and described in detail how and why that happened.

Foley had said I am not going to pay any money. I don't have any money. These notes are going to be in default. That's

just too bad. I don't have any money. I am not going to contribute anything.

Mr. Zipple and Mr. Silverstein evidently had dealings with this bank on other projects and couldn't have two notes in default sitting out there ruining their credit so they had to do something so they were prepared to go ahead and take care of these notes but to suit their own business purposes, but they didn't want any more dealings with these things.

Then there came the point and opportunity according to Mr. Zipple to number one get rid of a legal debt to Mr. Green, to have Mr. Green be responsible for pursing the note on his own behalf in taking care of all legal fees that might be incurred there and at the same time getting the notes off the books so they could get on with their business with Sovran Bank. That was what Mr. Zipple said and because

of those personal business considerations to him, this arrangement as spelled out in the letter from Mr. Green was made and carried through.

Legitimate business purpose, consideration on all ends as to why and how this was carried out. It was done that way. It was before this Court before Your Honor ruled in the final motion which is on appeal before the Circuit Court now.

I would suggest to the Court that there is really no reason to even hold open this 60(b)3 motion because if the Court of Appeals agrees that for some reason or other Mr. Green was not the proper owner of those notes, the Court will rule and the matter will come back either on a remand or a dismissal. If they don't rule that way, there is nothing here that is newly discovered or that wasn't aware to this Court at the be-

ginning so there is really no reason to hold it open.

THE COURT: Anything you want to add?

MR. HARTNETT: If I might just add one thing to the timeliness of this and I will be very brief, Your Honor. The letter in question we were provided with at the very moment of the hearing on the summary judgment, it was handed to me in the courtroom at that time. Obviously I did not have an opportunity to look at that letter at that time. I looked at the letter immediately thereafter and it was included in motion to vacate, which Your Honor denied. After that, we filed the appeal, and have been proceeding along track.

The letter was unconfirmed. It wasn't until the Zipple deposition that the facts as portrayed in the letter, extraordinary as they are, were actually

confirmed and we immediately brought this motion.

I have put together a time table of the important dates which I would like to hand up to the Court.

THE COURT: I think we have spent enough time on the case.

MR. HARTNETT: I understood, Your Honor.

THE COURT: This is neither newly discovered evidence or fraud that would warrant any relief from the judgment that is requested. This is evidence that was known or could easily have been determined with due diligence at the time of the original hearing. It constitutes neither newly discovered evidence nor fraud. The motion will be denied.

I will prepare the order.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

| | | |
|---|---|---|
| GARY GREEN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| V. | ) | CIVIL ACTION |
| | ) | NO. 87-350-A |
| MAURICE P. FOLEY, | ) | |
| | ) | |
| Defendant. | ) | |

O R D E R

Upon consideration of the Motion to Vacate Summary Judgment, and after consideration of the brief in support thereof including those arguments not previously made, it is hereby

ORDERED that the Motion to Vacate Summary Judgment be denied.

/s/
United States District Judge

Alexandria, Virginia
July 31st, 1987

**APPENDIX F**

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF VIRGINIA
ALEXANDRIA DIVISION

| | | |
|---|---|---|
| GARY GREEN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| V. | ) | CIVIL ACTION |
| | ) | NO. 87-350-A |
| MAURICE P. FOLEY, | ) | |
| | ) | |
| Defendant. | ) | |

O R D E R

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the plaintiff for summary judgment on the January 28, 1983 Guaranty of the defendant Maurice P. Foley in the amount of $221,500.00 is granted, and judgment is entered in favor of Gary Green against Maurice P. Foley in the amount of $221,500.00, plus costs and attorneys' fees.

2. The motion of the plaintiff for summary judgment on the August 2, 1982

Guaranty Agreement is denied.

3. The motion of the defendant Maurice P. Foley for summary judgment is denied; however, the plaintiff's claim for judgment in the amount of $38,244.45 contained in the complaint is dismissed without prejudice to the plaintiff's right to pursue collection of that amount in the Circuit Court of Fairfax County, Virginia.

/s/
United States District Judge

Alexandria, Virginia
July 22, 1987

**APPENDIX G**

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
Alexandria Division

GARY GREEN,

Plaintiff,

-vs-

CIVIL ACTION
NO. 87-350-A

MAURICE P. FOLEY, et al.,

Defendants.

Friday, July 2, 1987
Alexandria, Virginia

Transcript of motion for summary judgment in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR.,
Judge, United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

LAWRENCE FREEDMAN, ESQUIRE
10560 Main Street
Fairfax, Virginia 22030

FOR THE DEFENDANTS:

JOHN HARTNETT, ESQUIRE

BRINCEFIELD ASSOCIATES
526 King Street, Suite 423
Alexandria, Virginia 22313

* * *

DON McCOY, RPR
OFFICIAL COURT REPORTER
683-3668

P R O C E E D I N G S

THE CLERK: Civil Action No. 87-350-A, Gary Green versus Maurice P. Foley, et al.

MR. FREEDMAN: Good morning, Your Honor.

THE COURT: Is the Plaintiff's motion for summary judgment also on today?

MR. FREEDMAN: Yes. If I may, Your Honor, I would like to pass up to the Court two affidavits in support of the Plaintiff's request for motion for summary judgment that I have previously provided opposing counsel.

THE COURT: All right.

All right.

MR. FREEDMAN: Thank you, Your Honor.

Your Honor, the matter is I think a fairly simple straightforward case of a promissory note that is owned by my client, that he purchased for value from two banks that were holding those notes. The notes are in default, have not been paid. There is a guarantee agreement signed by the defendant as well as a defendant being a general partner in a partnership, which is the principal debtor on the note.

The admissions that are made in the pleadings by the defendant are that he is a general partner and that indeed he did make the guarantees that are a part of this suit.

The main defense, and I would suggest, Your Honor, that there is no affidavit that has been filed in support of the defendant's motion for summary judgment;

and there are no opposition affidavits filed to our affidavit on our motion for summary judgment. And so I would suggest to the Court that the only sworn to statements that there are before the Court today are the statements that the notes are due, the money is owed --

THE COURT: What have you to say though about this Virginia Code section which requires you to sue and pursue the other guarantors of the principal debtor?

MR. FREEDMAN: Your Honor, there is a Virginia Code section which says that when a demand is made by a guarantor on a note that the holder of the note must pursue the principal maker of the note and must do so within a certain time frame.

That provision however may be waived by the maker of the note. Now, in this particular case, Your Honor, in all of the agreements and in all of the notes, that

provision is waived.

THE COURT: Well, it's waived in one, but it is waived in the other? The other motion or the part that you point to as being a waiver, and that is the larger note, the original $7,800,000 note, says the lender may be under no obligation--may, but "shall be under no obligation to make a similar demand on any or all other guarantors."

MR. FREEDMAN: Um hum.

THE COURT: Now, you are not suing a guarantor here, are you? You are suing--

MR. FREEDMAN: We are. We are suing in two capacities. The defendant is both a general partner and therefore liable under the note and a general partner, the principal maker, Fairfax Associates; and in a secondary capacity as a guarantor. He is being sued in both capacities in this case.

In this instance if I may, Your Honor, he admits to being a general partner, and indeed he admits that he made the guarantee but if I may go a step further, when I received the letter and I looked and I talked to Mr. Green in Philadelphia, who also happens to be an attorney, I said to him, well, I think we should do this. He said we don't have to. I said let's do it anyway. And we did. We filed the suit.

THE COURT: Yes, but you let it sit out there in Fairfax since November, haven't you?

MR. FREEDMAN: No. We filed it and then they filed their actions in January. It's all part of the record that you have before you, Your Honor.

THE COURT: Can you say that is pursing it diligently?

MR. FREEDMAN: Well, in this Court I

would say not. In Fairfax it may be a different --

THE COURT: Have you asked for it to be set for trial?

MR. FREEDMAN: No, Your Honor. The rule out there is until discovery has-- frankly, I haven't pursued actively any discovery until I was waiting to see what was happening with this. But if I may, there is no obligation that we take-- first of all, putting that aside for a minute, there is no obligation that we take it to judgment out there before we proceed here.

THE COURT: No but you have to pursue it diligently and if you haven't even conducted any discovery, I wonder whether that can be construed as pursuing it diligently. You say you can't set it for trial until you conclude discovery but you haven't conducted any discovery.

MR. FREEDMAN: That's right.

THE COURT: I have a hard time finding that to be pursuing anything diligently to judgment.

MR. FREEDMAN: Your Honor, if I may, even if that were the case and even if somehow or other, Mr. Foley should slip out as a guarantor, he still is here as a general partner in this lawsuit here. And that has been alleged against him; and we have made a claim for that money and there has been no defense raised as to his liability in this Court as a general partner. The only defense that has been raised --

THE COURT: (Interposing) You mean as a principal debtor?

MR. FREEDMAN: That's right. Yes, sir. He is a principal debtor. He has been sued as such in this Court and has raised no defense at to that, and is liable for the full amounts under that

provision. The only matter that has been addressed by the defendant is claiming that we have not pursued it in Fairfax sufficiently so that he should not have a similar judgment entered against him here in this Court as a guarantor. I don't agree with that. But at the same time, Your Honor, it doesn't address the issue in any way that he is a principal debtor, a general partner in a partnership and is liable in that case and Your Honor has --

THE COURT: (Interposing) On both notes, you say?

MR. FREEDMAN: That's right. The same maker is the maker of both notes. Indeed, if I may, Your Honor, we don't even have an affidavit from Mr. Foley saying I am not liable. Yes, the answers generally say that they don't believe the money is owed; we have provided affidavits and proof that it is owed and we have no

counter affidavits.

Now, I personally feel and I feel that we are not under any obligation to actively pursue out in Fairfax. But even if the Court should so rule and hold off our summary judgment at this time, and hold off the whole case here, on the basis of that, as it relates to the guarantee, I still suggest are entitled to judgment with him as a maker of the note as a general partner. I would point to the defendant's answer in Answer No. 2. Mr. Foley admits he was a general partner of Fairfax Associates Limited. Mr. Foley admits he executed the guarantee agreement. Those are the first two sentences in that Answer No. 2.

Having admitted that and having not provided any affidavits to the Court to say that the money isn't due, I suggest to the Court that we are entitled to summary

judgment against Mr. Foley based upon that.

I would also represent that we are entitled to summary judgment on the guarantee as well. We have argued that in the brief, and I don't know if the Court wants to hear --

THE COURT: Mrs. Foley is not a general partner?

MR. FREEDMAN: No.

THE COURT: She is liable if at all as a guarantor?

MR. FREEDMAN: That's right, but she is not in this case.

THE COURT: She is not?

MR. FREEDMAN: No. What happened there is we filed in the U.S. District in Baltimore thinking that the two of them were married together and living in Maryland. But it turns out after we filed that she had moved to D.C., they had sep-

arated, so we had to nonsuit here.

THE COURT: So we don't have to worry about her?

MR. FREEDMAN: No, sir. Thank you.

THE COURT: All right.

MR. HARTNETT: Good morning, Your Honor. John Hartnett for the defendant.

Your Honor, this case has been around probably for too long, originally in Baltimore and now here. As was mentioned at the end of Mr. Freedman's argument, the selective defendant in this case have been Mr. and Mrs. Foley only. I think that it's disingenuous of plaintiff to state that he has sued Mr. Foley as a principal debtor. He has not.

THE COURT: Well, he says he has.

MR. HARTNETT: Well, Mr.Foley --were Mr. Foley to have been sued properly as a principal debtor, they would have had to have sued the partnership as well because

under the Code section that is referenced in our opposition to motion for summary judgment, as to contracts liability of the general partner is joint, not joint and several. And therefore, all of the partners to the partnership are indispensable parties in a suit such as this. Obviously they haven't done that. And in fact in this other suit in Fairfax, they didn't sue Mr. Foley. They didn't sue Mr. Foley because they didn't want Mr. Foley to know there was a suit in Fairfax and in fact Mr. Foley didn't learn until I learned that roughly a month ago when discussing arranging this present motion before the Court.

In point of fact, the information we received at the time we provided Mr. Green with notice under 4925 and 4926, and I would add at this point that there is no allegation that that notice was insuffi-

cient. And I don't think it was. But at the time we gave them notice, the information we had from Mr. Green was that that section was wholly inapplicable to the circumstances, and they weren't going to sue and that whatever rights Mr. Foley had been waived. 29 days later they filed suit.

THE COURT: Don't you think maybe he has waived it in that, insofar as the bigger note is concerned?

MR. HARTNETT: No, Your Honor, I don't, and I would refer the Court to a couple of cases on waiver. I am not fully prepared to argue waiver today, Your Honor, because we have not received any opposition to our summary judgment motion so we weren't prepared to argue waiver. We were prepared to argue whether or not Mr. Foley is liable on the merits of the case. I will refer the Court to a couple

of cases on waiver and that is a Georgia Court of Appeals case, Blacknol Company v. Brasee, (phonetic), 251 72d, 123. That is a 1978 case, Your Honor.

More importantly, the 19 --

THE COURT: (Interposing) If you have got to go to a Georgia Court of Appeals for precedent, you are in trouble.

MR. HARTNETT: Your Honor, the notice statute that we have in Virginia is the oldest one that there is in the United States. As you probably know it essentially embodies the rule of Payne v. Packard (phonetic). It goes back a long, long way and its policies go back a long, long way, but there is hardly any law on it, unfortunately. What law there is talks about the responsibilities of a creditor and that is the Kasnovsky case (phonetic), that I believe was decided by someone very close to you back about 1980. That is a

Virginia case. It holds the creditor to a high degree of diligence in pursuing the principal obligors, not only the principal obligors but also the other guarantors themselves. It in fact extended the impact of the Virginia notice statute.

Unfortunately, in terms of waiver and questions like that, I haven't been able to find any Virginia law. However, in doing a little bit of research on waiver, the Kentucky statute, they have a notice statute as well, and their is virtually identical to ours. And there is a case under Kentucky Law that I would refer the Court to as well, and that is Coone v. Beneficial Finance Company (phonetic), 549 Southwest 2d 327. That case in particular is interesting because it talks about the waiver and it talks about how specifically a waiver has to be in order to be effective against a surety and of course they

go into the policy reasons for their notice statute. But what's interesting about that case is the guarantee agreement in that case, Your Honor, specifically states that the creditor doesn't have to exhaust his remedies against the principal debtor but moreover, states that the surety, the guarantor in that instance, waives all of his remedies under law.

Now certainly, the guarantee agreements in our case, neither one of them and I think that one is stronger than the other but I don't think that either one of them measure up to the standards that the Georgia and Kentucky case articulates, but neither one of those agreements are specific enough to tell Mr. Foley that --

THE COURT: (Interposing) I don't know, that guarantee of January 28, 1983 waives any effort of every kind to collect from the principal debtor or anyone else

liable there. That's pretty specific, isn't it?

MR. HARTNETT: It's specific, Your Honor, to the extent that it is more specific than the first, the larger loan, but --

THE COURT: Well, that guarantee now guarantees the larger loan, didn't it? I mean what's left of the larger loan?

MR. HARTNETT: On that $7 million loan, I think there is only about $30,000 or something.

THE COURT: But the other is $220,000, the guarantee that I just read is up to $220,000.

MR. HARTNETT: That's correct, Your Honor. Under the law of that Kentucky case, essentially what the Kentucky and Georgia cases are saying, if you want to have a waiver effective against a surety, you have got to tell him that they are

waiving a statutory right that they have got. Neither one of these guarantees do anything of the kind. That is pretty much, both of them are pretty much boiler-plate kinds of guarantee agreements. And they are seen all the time. But they are not specific enough to unseat a guarantor and in this instance Mr. Foley was an accommodation surety only.

THE COURT: That doesn't help you much. An accommodation party is not covered by this statute, is it?

MR. HARTNETT: Yes, Your Honor. The statute itself refers to guarantors and sureties. I believe that --

THE COURT: (Interposing) But an accommodation party on a note is a much broader liability. I noticed you said that in your pleadings, and I wondered did you really mean it, did you want to be treated as an accommodation --

MR. HARTNETT: (Interposing) Well, he is not on the note, Your Honor. He is merely a guarantor.

THE COURT: I don't think he is an accommodation maker either, but you said he was in your brief at one point, and I wondered about it.

MR. HARTNETT: Well, if there is a statement that we have said he is an accommodation maker, we certainly did not mean it.

THE COURT: I don't know whether you used the word "maker."

MR. HARTNETT: But he is merely a guarantor of those notes. The principal debtor is obviously the partnership. It's clear what is going on in this case, Your Honor. What happened here is there was a falling out among the partners and two partners who recruited Mr. Foley at that point in time when those notices fell

overdue came up with Mr. Green. Mr. Green purchased the notes from the two banks so that they could use Mr. Green to force Mr. Foley to pay all of the obligations of the partnership. That is exactly the situation that 4925 is trying to avoid. And it goes back to the 1800s, where the Commonwealth of Virginia took cognizance of this kind of mischief, and the purpose of codifying the Virginia notice statute and the rule of Payne v. Packard was to protect a guarantor in just this situation where through essentially collusion among the partners and a strawman creditor, the partners could force an innocent partner, who they have duped, to pay all of the debts of a partnership that was in trouble.

That is exactly what's happened here. And that is why the Fairfax suit hasn't been pursued with vigor. It's barely been

pursued at all.

THE COURT: Who is the Fairfax suit against again?

MR. HARTNETT: The defendants in the Fairfax suit are the other general partner, a fellow by the name of Zimble. (phonetic)

THE COURT: Is the partnership sued?

MR. HARTNETT: Yes, Your Honor, it is. But Mr. Foley interestingly enough has not been sued because again they didn't want Mr. Foley to know about the lawsuit.

The circumstances here, Your Honor, are such and what I believe the plain reading of 4925 and 4926 really calls for, and the equities of the case as well, is that Mr. Green first pursued his remedy against the principal debtor, the partnership. When he goes over to Fairfax and actually pursued with diligence, and I might

add here that the statute says due diligence to judgment and execution. That is a quote from the statute. When he does that, and this case is dismissed hopefully or is resolved at trial, but we believe it ought to be dismissed, Mr. Foley is going to join in that Fairfax case. He wants to have a hearing as well as to what his liabilities are in the partnership. What they are looking to do is to have Mr. Foley entirely and only liable by using this Court to do it.

THE COURT: I think I understand it.

MR. HARTNETT: Your Honor, I think that as far as just another procedural matter, the fact that there have been no affidavits filed, I don't think we needed to file affidavits here. Take a look at the affidavits that the plaintiff submitted. I don't think that those matters would be admissible at trial.

THE COURT: Affidavits very rarely are, but they are appropriate in summary judgment. I think I understand the party's position.

MR. HARTNETT: And again I would simply add, Your Honor, that there has been no opposition to our motion filed whatsoever. We think that it's within the Court's power for that reason simply to grant our motion and we add that there are two alternatives the Court can do. You can dismiss with prejudice or without. And without prejudice would allow him to pursue in Fairfax with diligence.

Thank you, Your Honor.

MR. FREEDMAN: May I briefly address the Court?

THE COURT: Very briefly.

MR. FREEDMAN: We have filed an opposition. I mailed it to counsel on Monday. I don't know why he doesn't have it.

MR. HARTNETT: I don't have it. I haven't seen it.

MR. FREEDMAN: I'm sorry about that. I will be happy to provide him a copy. We did file it and mailed it to him on Monday. I would simply call the Court's attention to the complaint as filed originally. I would ask the Court to look at paragraph No. 3 in the original complaint, which states that in paragraph 2, which assess that Foley himself is a general partner and the money is owed by him as a general partner. The same thing is true in the next count.

Further, Your Honor, if in fact counsel felt the party should be brought in or indispensable parties, he should have filed a motion accordingly.

No such motion has been filed in this case.

THE COURT: I don't think this can be

construed as a suit against Foley as a principal debtor, even though that is stated in the complaint. The attachments indicate that the principal debtor is the partnership. If the suit is intended as a suit against Foley as a partner and to impose liability individually as a general partner, it isn't appropriately brought. It isn't brought against the partnership. So I think you have got to look to Foley's liability if at all as a guarantor.

And I think he has waived his right to insist on a 49-25 of the Virginia Code insofar as his liability under the January 28, 1983 guarantee of the $221,500 indebtedness. The statement in that guarantee that he waives all efforts of every kind to collect from the principal debtor or anyone else liable therewith, is a waiver, it seems to me of his right to insist on compliance with 49-25 of the Virginia

Code.

I therefore think the -- and there is no question that that indebtedness that is guaranteed under that guarantee is due and owing and unpaid, and that Foley is liable on it. So the plaintiff is entitled in my view to summary judgment on that note. That is, the note guaranteed by the January 28, 1983 guarantee.

The other note originally larger but the unpaid balance of which is now $38,000, I think the defendant is entitled to dismissal of the claim on that note without prejudice however, so that -- I mean the defendant is entitled to dismissal of the claim on that note without prejudice so that the plaintiff can pursue it to judgment in the Circuit Court, because I don't -- I think the defendant insofar as that note is concerned has not waived his right to insist on a compliance with

49-25 of the Virginia Code. And I don't think there has been a compliance with that. Filing suit and letting it drift in Fairfax is not in my view, not only filing suit but the requirement that it be pursued to judgment with diligence, with the concession that no discovery has been taken on it. So I will grant the plaintiff summary judgment on the $221,000 indebtedness. I will deny the plaintiff summary judgment on the $38,000 indebtedness and dismiss that claim on the defendant's money without prejudice.

I will prepare the order. I will need the original of those documents, Mr. Freedman.

MR. FREEDMAN: Original of what, Your Honor?

THE COURT: Original of the $221,000 note, guarantee. The original of the guarantee. I will prepare the order.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

**APPENDIX H**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| GARY GREEN, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | CIVIL ACTION |
| | : | NO. HAR 86-2639 |
| MAURICE P. FOLEY, | : | |
| | : | |
| Defendant | : | |

O R D E R

Upon consideration of Defendant's Motion for Change of Venue (Forum Non Conveniens), and the opposition and reply filed thereto, it appears that the factors outlined in Brierwood Shoe Corporation v. Sears, Roebuck & Co., 479 F. Supp. 563, 565 (S.D.N.Y. 1979), weigh heavily in favor of transferring this case to the United States District Court for the Eastern District of Virginia. The plaintiff has suggested that the defendant should bear the plaintiff's costs of litigating in the transferee forum. Bacon v.

John Hancock, 317 F. Supp. 302 (D. Md. 1970). This Court denies this request.

Therefore, IT IS, this 5th day of March, 1987, ORDERED:

1. That Defendant's Motion for Change of Venue BE, and the same hereby IS, GRANTED. The case is transferred to the United States District Court for the Eastern District of Virginia, Alexandria Division, pursuant to 28 U.S.C. §1404. Venue is proper in that Court because the cause of action arose in that district. 28 U.S.C. §1391(a). The parties will bear their own costs.

2. The Clerk of the Court shall send copies of this Order to counsel of record.

/s/ John R. Hargrove
United States District Judge

**APPENDIX I**

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

Francis D. Murnaghan, Jr.
United States Circuit Judge
United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201 October 12, 1988

Office of Disciplinary Counsel
The Disciplinary Board of the Supreme
Court of Pennsylvania
3rd Floor, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

Dear Sir or Madam:

It is with great regret that we bring to your attention the actions of a member of the Pennsylvania bar for investigation and possible disciplinary action. Because he is not a member of the bar of the United States Court of Appeals for the Fourth Circuit, and because he appeared before us as a party and not as counsel, we are unable to initiate such action ourselves.

The attorney in question is Gary Green, of the law firm Sidkoff, Pincus & Green, 530 Walnut Street, Twelfth Floor, Philadelphia, PA 19106. Mr. Green was the plaintiff-appellee in Green v. Foley, Nos. 87-2639, 87-2685 (4th Cir. Sept. 13, 1988). A copy of our opinion in the case is enclosed.

In Green v. Foley, we held that re-

lief from judgment under Fed. R. Civ. P. 60(b)(3) was warranted and was improperly denied by the district court in view of the material misrepresentations made by Mr. Green in his pleadings in the district court. We also call your attention to footnote 2 of the opinion, where we note that Mr. Green left his erstwhile clients exposed to double liability on the notes involved in the transaction giving rise to the litigation.

Mr. John M. Greacen, the Clerk of our Court, is prepared to provide any assistance you may require, including copies of briefs and other materials filed in this Court. Thank you for your attention to this matter.

This letter is written with the concurrences of Chief Judge Winter and Judge Sprouse.

Sincerely,
Francis D. Murnaghan, Jr.
Circuit Judge

FDMjr:mam
Enclosure

cc: Circuit Judges
Chief Judge Bryan, E.D. Va. (w/encl)
Mr. John M. Greacen, Clerk
Mr. Gary Green (w/encl)
Mr. John Raymond Hartnett
Mr. Lawrence E. Freedman

**APPENDIX J**

AFFIDAVIT

Gary Green, being duly sworn according to law, deposes and says the following:

1. On February 1, 1985, I acquired all of the rights from Crossland Savings and Loan, FSB to a Deed of Trust Note and Guaranty Agreement dated August 2, 1982, in the amount of Seven Million Eight Hundred Thousand Dollars upon the payment of $31,647.81. (True and correct copies of the Deed of Trust Note, Guaranty Agreement and checks are attached hereto as Exhibits A, B and C.)

2. On or before February, 1985, I acquired all of the rights from Sovran Bank, N.A., to a Note and Guaranty Agreement dated September 4, 1984, in the amount of Two Hundred Sixty Thousand Dollars upon the payment of $260,000.00.

(True and correct copies of the Note and Guaranty Agreement are attached hereto as Exhibits D and E).

3. All of the rights in the Notes and Guaranty Agreements including all proceeds derived therefrom belong to me and the law firm of which I am a principal, and no other party has any rights in same.

4. The two Notes mentioned above are in default and the amounts due at the time when I acquired the Notes are those stated in the Complaint.

/s/ Gary Green

Sworn to and subscribed before me
this 4th day of June, 1987.
/s/ Eileen R. Januszka
Notary Public, Phila. Co.
My Commission Expires Sept. 3, 1990

**APPENDIX K**

AFFIDAVIT

David L. Gunn, Senior Vice President of Sovran Bank, N.A., hereby deposes and says the following:

1. Maurice Foley and Judith Foley are Guarantors pursuant to an agreement ("Guaranty Agreement") on a Note to Sovran Bank dated September 4, 1984, in the amount of Two Hundred Sixty Thousand Dollars ("NOTE").

2. On about December 31, 1984, Sovran Bank, N.A., for payment of $260,000 on a check from Gary Green assigned all of its rights and interests in the NOTE and GUARANTY AGREEMENT to Gary Green for value received from him.

3. Sovran Bank, N.A. has no further interest in the NOTE or the GUARANTY AGREEMENT.

/s/ David L. Gunn

City of Fairfax
Commonwealth of Virginia

Sworn and subscribed before
me this 9th day of June,
1987.

/s/ Elizabeth Caron
Notary

My Commission Expires: June 9, 1989

**APPENDIX L**

V I R G I N I A :  C O P Y

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

| | | |
|---|---|---|
| GARY GREEN, Plaintiff, | : | |
| versus, | : | AT LAW NO. 76682 |
| | : | AT LAW NO. 81020 |
| STEPHEN M. ZIMPEL, AND ALAN H. SILVERSTEIN, et al., Defendants. | : | |

Alexandria, Virginia
Monday, May 9, 1988

Deposition of

ALAN SILVERSTEIN,

a witness, called for examination by counsel for the defendant, Mr. Foley, pursuant to notice, in the offices of Brincefield, Hartnett & Associates, Suite 423, 526 King Street, Alexandria, Virginia 22314, beginning at 2:30 o'clock p.m., before Saundra A. Ikenberry, a Verbatim Reporter and a Notary Public in and for the Commonwealth of Virginia at large, when there

were present on behalf of the respective parties:

FINNEY & ASSOCIATES
Court Reporting Service
11417 Meath Drive
Fairfax, Virginia 22030
(703) 278-8923

For the Plaintiff:

LAWRENCE E. FREEDMAN, ESQUIRE
Suite PH-9
10560 Main Street
Fairfax, Virginia 22030

For the Defendant Mr. Foley:

JOHN R. HARTNETT, ESQUIRE
Brincefield, Hartnett & Associates
Suite 423
526 King Street
Alexandria, Virginia 22314

For the Defendant Mr. Silverstein:

ROBERT J. ZELNICK, ESQUIRE
Szabo, McCarthy, Quinto, Webb & Zelnick
12610 Lake Ridge Drive
Woodbridge, Virginia 22192

* * *

Whereupon,

ALAN SILVERSTEIN,

a witness, was called for examination by counsel for the defendant, Mr. Foley, and,

having been first duly sworn by the Notary Public, was examined and testified as follows:

* * *

Q. Had he told you whether or not he had any monies to contribute?

A. On some occasions I remember Mr. Foley telling me that things were tight and he really wasn't in a position to do anything.

Q. Were you and Zimpel in a posture at the time of these transactions leading up to the December 14th letter and agreement with Green, that you knew that the bank could get its money from you to anyway?

A. Yes.

Q. And were you in a position that by entering into this agreement you were saving yourself at least $10,000 in legal fees plus any of the other benefits that

were enumerated in the letter?

A. That was the idea, yes.

Q. At that time then when you put the money into the bank, was the sole purpose of the funds being put into the bank by yourself, Zimpel, or whoever actually made the deposit, to carry out the terms of the agreements as spelled out in the December 14th agreement?

A. That's correct.

Q. Subsequent to the funds being then taken back out again of the Fairfax Associates' account, were the funds then utilized for the purpose of carrying out the terms of the December 14th agreement?

A. Yes.

Q. Was it ever intended that the monies that were put into the Fairfax Associates' checking account were intended to belong to Fairfax Associates?

A. Definitely not.

Q. Were they ever intended to be used to pay off any indebtedness as against fulfilling the obligation and with the agreement which is to purchase and have assigned to Green or his law firm, notes?

A. I'm sorry. I didn't understand your question.

Q. Was it intended when the monies were being put up to pay off the notes or alternatively was it intended to carry out the terms of the agreement with Green which says that the notes will be purchased and signed or assigned to Green or his law firm?

A. The intention was what was embodied in our agreement with Mr. Green.

Q. Would it be accurate to state then that it was not your intention at any point in time to actually pay off the notes with either the funds that were put

in and taken out of the Fairfax Associates' account or with any other funds?

A. That's correct.

Q. A moment ago in response to a question you were asked as to whether or not you had any independent recollection of discussing with Zimpel these transactions, you said, no.

Now, were you saying, no, that you don't have any independent recollection of what the conversation entailed or whether you had no independent recollections of whether it was actually ever discussed?

A. Well, I think I said I'm sure we had discussions about them but I have no specific recollection of what we discussed.

Q. Contents of the discussions, right?

A. Right.

Q. On Exhibit No. 4, which combines

the two debit slips and the cashier's check, the funds were debited in the appropriate amounts out of your account and Mr. Zimpel's account and then combined into one cashier's check as shown on that sheet?

A. I would infer that from the sheet and from the transaction. I don't specifically recall.

MR. FREEDMAN: I have no further questions.

MR. ZELNICK: I have no questions.

**APPENDIX M**

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GARY GREEN,

Plaintiff,

vs. At Law No. 76682

STEPHEN M. ZIMPEL, et al.,

Defendants.

Alexandria, Virginia
Monday, June 6, 1988

Deposition of DAVID L. GUNN, called for examination by counsel for the defendant, pursuant to notice, at the offices of John R. Hartnett, Esq., Brincefield & Associates, P.C., 526 King Street, Suite 423, Alexandria, Virginia 22314, before Glenn R. Neuhaus, a notary public in and for the State of Virginia, beginning at 10:00 a.m., when were present on behalf of the respective parties:

FOR THE PLAINTIFF:

LAWRENCE E. FREEDMAN, Esq.

Penthouse, 10560 Main Street,
Fairfax, Virginia 22030

FOR THE DEFENDANT:

JOHN R. HARTNETT, Esq.,
Brincefield & Associates,
P.C., 526 King Street,
Suite 423, Alexandria,
Virginia 22314

P R O C E E D I N G S

Whereupon,

DAVID L. GUNN,

was called for examination by counsel for the defendant, and after having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MR. HARTNETT:

Q Would you please state your name, sir.

A My name is David Gunn.

Q And what is your address?

A 5607 Hampton Forest Way, Fairfax, Virginia 22030

Q And where do you work?

A I presently work for Madison National Bank of Virginia.

Q How long have you worked for Madison National?

A About four months.

Q Prior to working for Madison National, by whom were you employed?

A I was employed by Sovran Bank.

Q How long did you work for Sovran Bank?

A By Sovran and its predecessors, about 17 1/2 years.

Q And in what capacity were you employed by Sovran that period?

A Yes.

(Deposition Exhibit No. 3 was introduced for identification.)

BY MR. HARTNETT:

Q Let me ask you to look at Exhibit 3, and there we have three documents and the top one -- or perhaps

you would describe what the top document on this sheet is.

A The top document is a debit which is a charge to a checking account and in this case it's a charge to Al Silverstein's account.

Q How about the second document?

A The second document is likewise a debit to a checking account charged to Steve Zimpel's account.

Q Are these debit forms the internal document used by the bank to deduct checks from the checking account?

A To deduct an amount.

Q An amount from?

A From a checking account in this case, yes.

Q And the third document on Exhibit 3 is a cashier's check made out to Sovran Bank on which Gary Green's name appears.

A Yes.

Q As well as your name.

What, if anything, do you recall about this cashier's check signed by you and made payable to the bank?

A Basically my recollection would be that Mr. Zimpel and Mr. Silverstein advised me that they wished to have the note, which we haven't discussed yet, purchased by one Gary Green and they asked that I debit their account, which are the first two items on this page, to pay for that cashier's check and to draw the cashier's check and then to use that to, in fact, purchase the note payable to the bank by Fairfax Associates.

Actually, I think there were two notes.

Q. Do you remember who actually requested you to do that, whether it was Mr. Zimpel or Mr. Silverstein?

A No.

Q Were they personally in the bank that day or was this request by telephone?

A My recollection is they were personally in the bank.

Q Both of them?

A I believe so.

Q And with that request that their respective accounts be debited in these amounts, was there a check drawn or was it simply the request and then the debit entered?

A These would be the totals of the entries that were made that are shown on the exhibit.

Q Would they have had to have provided you with a check drawn on --

A No.

Q So the request would have been sufficient.

Do you recall that the request, in

fact, was sufficient to produce these two debits?

A Yes.

Q And it was upon the instruction of one or the other of them.

A Or both.

Q Or both Mr. Zimpel and Mr. Silverstein that you put Gary Green's name on this cashier's check, is that correct?

A Correct.

Q And once the cashier's check was produce for Mr. Zimpel and Mr. Silverstein, what was done with the cashier's check?

A They, in fact, delivered the check to me and asked that the check be received in purchase of the full amount that was due on the notes to Fairfax Associates.

Q You say notes, plural, is that correct?

A My recollection is that there were two different notes, I believe.

Q And prior to this time had they asked you what the pay-out figure was for the indebtedness of Fairfax Associates to the bank?

A I don't recall.

Q My question really relates to the number on the cashier's check.

Is that something you would have been readily able to ascertain?

A Sure.

Q Upon their request?

A Absolutely.

Q But you don't remember whether the request came prior to the creation of this check or at the time when they asked for these debits?

A Not specifically.

Q Let me ask you to look at again Exhibits 1 and 2 and were you aware that a

deposit totaling the same amount of these two debits was made into the Fairfax Associates' account and shortly thereafter withdrawn back out of the account of Fairfax Associates prior to the purchase of this cashier's check?

A No.

(Deposition Exhibit No. 6 was introduced for identification.)

BY MR. HARNETT:

Q Let me ask you to look at Exhibit 6, and would you tell me what this document is the way it's described by the bank.

A This instrument basically is for internal bank use and it's use to describe a loan that's been made.

Q Does it have a name? I notice at the top corner it says single note write-up and is that what it would be called?

A Yes.

Q Did Mr. Zimpel and Mr. Silverstein have a line of credit with the bank as of December 5, 1983, the date on this exhibit?

A My recollection is that they did. I think they each had individual lines.

Q I notice at the bottom under comments this was a draw under Stephen M. Zimpel's $300,000 guidance line, approved 10-21-83. Guidance line? Is that a line of credit?

A I don't believe so.

Q Have you ever met Mr. Green in person?

A I don't believe so.

Q Have you ever discussed this lawsuit with Mr. Green?

A I'm quite sure I have.

Q What was the subject

specifically of those conversations?

A I can't recall.

Q Have you discussed this lawsuit with Ms. Brass-Corey?

A Yes.

Q Do you recall the specific subject matter of those discussions?

MR. FREEDMAN: Let me enter an objection to this whole line of questioning.

THE WITNESS: The answer would be no.

MR. HARTNETT: I think that's all I have.

EXAMINATION BY COUNSEL FOR THE PLAINTIFF BY MR. FREEDMAN:

Q Mr. Gunn, I'm Lawrence Freedman. I represent Mr. Green and I'd like to ask you a couple of very direct questions.

A Sure.

Q First, when you indicated before that you didn't have any recollection of the mailing of the notes back to Mr.

Green, am I accurate in gleaning from that answer you're saying you don't recall how that went down, whether you mailed it or turned it over to somebody or just how that happened? You're not saying that you did not mail them.

A That's correct.

Q Going back to the 31st of December, 1984, you indicated to us that Mr. Zimpel and Mr. Silverstein were at the bank and at that time you received a directive from them that you were to debit their account in the amount necessary to purchase the cashier's check to purchase the notes -- for the purchase of the notes by Mr. Green, is that correct?

A That's correct.

Q Was there ever any discussion that day that you should debit to take the money out of the Fairfax Associates accounts or was it your direction from Mr.

Zimpel and Mr. Silverstein that in fact you should take it out of their personal accounts, as you did?

A I would say yes. I don't recall any conversation about the Fairfax Associates account at all.

Q They came in and told you or you already knew Mr. Green was purchasing the notes and they told you to debit their personal accounts to pay for the cashier's check which Mr. Green was to use to purchase the notes.

A That's correct.

Q And that's exactly what happened.

A Yes.

Q Is there any doubt in your mind during the course of that transaction as described to you by Mr. Zimpel or Mr. Silverstein that in fact Mr. Green was purchasing the notes and it was being done

just as you did it?

A That was certainly my understanding.

Q From the parties at that time.

A Yes.

Q Was there ever any conversation or were you ever told that in fact these notes were being paid off rather than being purchased?

A No.

Q They were always being purchased by Mr. Green?

A Yes.

Q Was there ever any conversation that in fact Fairfax Associates was paying off these notes in any way, shape or form?

A No.

Q It was always a purchase by Mr. Green utilizing the funds you'd preciously described.

A Yes.

Q Do you happen to recall or if anybody has a calendar handy what day of the week the 31st of December was in 1984.

A No.

Q Have you since the transaction occurred on the 31st of December, 1984, in fact, verified it as Mr. Green who purchased these notes, who received these notes from Sovran Bank.

A I'm not sure what you mean by the word verified but I know subsequently I honestly have had calls from Mr. Green and Mr. Green's office stating he in fact was now the holder of the note and he needed information and so on and so forth so it was certainly my impression, my understanding that in fact they did come about.

MR. FREEDMAN: I have no other questions.

**APPENDIX N**

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

| | |
|---|---|
| GARY GREEN, | : |
| | : |
| Plaintiff | : |
| | : |
| v. | : |
| | : |
| MAURICE P. FOLEY, | : |
| | : |
| Defendant | : |

AFFIDAVIT OF GARY GREEN

Gary Green, being duly sworn, deposes and says:

1. I am the Plaintiff in the above captioned action.

2. I am an attorney licensed to practice in the Commonwealth of Pennsylvania since September of 1972. My practice has consisted primarily of trial law, with a heavy emphasis on civil rights, and other complex litigation in Federal Courts. In addition to litigation, I have on occasion performed services for corporate clients and individuals in the form

of helping them to devise business strategies and drafting contracts.

3. I have never represented any banks, and do not hold myself out as, nor regard myself to be an expert in banking matters or commercial paper; when such issues have been raised in client matters, they have been handled generally by other attorneys in my firm. I believe I am qualified to handle cases and issues involving the law of Pennsylvania and most Federal litigation, but I recognize that I lack the qualifications to handle for clients matters involving Virginia law, and except where Virginia law is the same as Pennsylvania law, I am unfamiliar with it.

4. I met Alan Silverstein in approximately 1977 when he was a staff attorney for the Equal Employment Opportunity Commission, assigned to the Phila-

delphia Regional Office of that agency. At the time, I was representing a class of women who were suing Sun Oil Company for violations of Title VII, and Mr. Silverstein was counsel for the EEOC in a companion suit against the same employer. Our cases were consolidated, and Mr. Silverstein and I collaborated in presenting a joint case against the employer which achieved a very successful result. Mr. Silverstein and I became friends as a result of that case.

5. When Mr. Silverstein left the EEOC in October of 1981, he joined up with Stephen Zimpel and went into the building development business in the northern Virginia area. I had contact with Mr. Silverstein on a friendly basis, but as I had no expertise in the law of building development or real estate, and was not familiar with the local law where his

business was being conducted, I performed no legal services for Mr. Silverstein or Mr. Zimpel on those matters, but rather, they employed attorneys in Virginia and Washington, D.C.

6. The attorneys from Virginia and Washington, D.C. that Messrs. Zimpel and Silverstein used and relied on from 1981 through about 1987 included:

(a) William Hanes, Esquire
(Washington, D.C.)

(b) Pohoryles and Greenstein, P.C.
(Washington, D.C.)

(c) Robert Staton, Esquire
(Washington, D.C.)

(d) Metzger, Shadiac and Schwartz
(Annandale, Va.)

(e) Russel Sherman, Esquire
(Annandale, Va.)

(f) Madigan and Scott, Inc.
(Springfield, Va.)

(g) Robert Madigan, Esquire
(Springfield, Va.)

(h) Szabo, McCarthy, Quinto, Webb and Zelnick, P.C.
(Woodbridge, Va.)

(i) Thomas J. Colucci, Esquire (Arlington, Va.)

7. Although my lawfirm and I had been requested on occasion to perform legal services involving Virginia law for Messrs. Zimpel and Silverstein, and entities they owned, it was necessary for me and my firm to decline the assignments. I made it emphatically clear that my lawfirm's expertise with Virginia law was too deficient and we were too ignorant of the unique provisions of Virginia law to perform professional services for them where Virginia law would be involved. In short, I have not advised these or other clients about Virginia law.

8. In approximately 1982, Messrs. Silverstein and Zimpel became interested in several business ventures which were based in and around Philadelphia, and they asked me to represent them in some of

those matters; these business ventures were not in any way related to their building development business or what they were doing in their home state, but rather were in the nature of loans to and investments in small commercial companies that Mr. Silverstein and his usual business partner, Stephen Zimpel, were making. My role was generally to form Pennsylvania corporations for them and/or to prepare agreements which would protect their investments or loans in Pennsylvania, and sometimes, to help negotiate the deals. This resulted in only infrequent involvement with Messrs. Zimpel and Silverstein in professional matters although I still maintain a social relationship with Mr. Silverstein.

9. In 1983, Mr. Silverstein advised me that he and Mr. Zimpel wanted to increase the diversification of their in-

vestments as a hedge against the risks of a down-turn in their local real estate/ building development business. I mentioned that I knew of a situation involving the principal shareholders of a former corporate client ("DEG") that Mr. Silverstein might wish to explore. DEG was in the business of asbestos removal, and the principal shareholders were not getting along with Wallach Gear Co., a venture capital shareholder which had guaranteed DEG's debt. It was my view that if Messrs. Zimpel and Silverstein were willing to invest or loan cash to replace Wallach Gear Co., and to assume its guaranty on the loans made by DEG's banks, they probably could obtain a meaningful ownership position in DEG. I told Mr. Silverstein that while I did not represent DEG, I was willing to talk to the principal shareholders, and to act as an

intermediary. Mr. Silverstein told me to proceed, and stated that he would reward my efforts with a bonus fee if the transaction succeeded. Ultimately, Mr. Silverstein promised to pay me a bonus fee of $10,000.00 for acting as intermediary and for bringing him the opportunity.

10. In the period March - April of 1984, Messrs. Zimpel and Silverstein did in fact make loans to DEG, and did replace Wallach Gear Co. as a 40% shareholder in DEB. After the initial agreement between the DEG shareholders and Messrs. Zimpel and Silverstein had been reached, my firm was retained by DEG as its attorney, and it was paid on an hourly rate basis for the services lawyers in my firm rendered.

11. During 1984, as a result of the participation by Messrs. Zimpel and Silverstein in the affairs of DEG (which was based in Malvern, Pennsylvania, a

suburb of Philadelphia), and due to their interests in other Pennsylvania based businesses, I had much more contact with them. I still did not have any knowledge of, nor involvement in any of the Virginia based real estate/building development activities engaged in by Messrs. Zimpel and Silverstein and/or their various business entities.

12. Throughout most of 1984, discussion of my $10,000 bonus fee with Messrs. Silverstein and Zimpel was deferred due to the press of other matters.

13. In November of 1984, I met with Messrs. Zimpel and Silverstein at their office in Virginia to review some of the issues I was handling for them, including DEG. During the meeting Messrs. Zimpel and Silverstein were distracted from the matters I had come to discuss and were quite distressed by a business transaction

involving the defendant Maurice Foley and two banks that Messrs. Zimpel and Silverstein used regularly for their building development business.

14. Prior to my November meeting with Messrs. Zimpel and Silverstein, I had never heard of Mr. Foley, nor did I know anything about any business transaction involving him. I also knew nothing of Messrs. Zimpel and Silverstein's relationship with Mr. Foley. As part of the conversation, both Messrs, Zimpel and Silverstein told me that several years prior, they had entered into a partnership with Mr. Foley in connection with the conversion of apartments to condominium units. They stated that they had paid Mr. Foley $20,000 and had given him 40% of the partnership (Fairfax Associates) to act as a guarantor on notes of Fairfax Associates held by two banks; Mr. Zimpel, his wife

and Mr. Silverstein were also guarantors on the Fairfax Associates notes which, evidenced money loaned to it.

The project was originally to be 100% financed by the bank loans, and they related to me that at first, none of the partners paid any money except for the $20,000 Messrs. Zimpel and Silverstein paid to Mr. Foley. The condominiums were to be converted by Fairfax Associates, a partnership consisting of Zimpel and Foley as equal general partners, and Silverstein as 20% a limited partner. They stated further that in its first year of operations, all of the partners had taken from Fairfax Associates substantial sums of money as anticipated profits, but that they had miscalculated and were told by the banks that they had taken out too much money, thus requiring immediate repayment of substantial portions of the bank loans

by the individual guarantors. In the end, Fairfax Associates showed a big loss and had no assets.

15. The reason why Messrs. Zimpel and Silverstein were upset at the November 1984 meeting is that there was approximately $275,000 still due to the banks, Fairfax Associates had no assets, and their request to Mr. Foley that he contribute to paying off this final debt had been rejected flatly.

16. Messrs. Zimpel and Silverstein explained further that they had each made repayments to the bank out of their personal funds in the preceding years, but Mr. Foley, who had received more than $200,000 in "anticipated profits", had refused to make any repayment contributions to the bank loans himself, and in fact, had paid nothing. They stated further that when Fairfax Associates ran out

of money but still had not completed the conversion of the condominiums, the two of them had used still additional personal funds to pay contractors, but had received no reimbursement or contributions from Mr. Foley. Their present dilemma was that they needed to maintain good relationships with the two banks because of their other building projects which were financed by these two banks, but the banks were demanding that they, as guarantors of the partnership's loans, take care of the outstanding debt.

17. Out of curiosity, I asked why the banks or they did not consider instituting suit to collect the balance from Mr. Foley. They replied that Mr. Foley had refused to make any contribution, and in fact had told them that he was "broke", judgment proof, and not concerned about any action the banks might take against

him to enforce the notes and his guarantees. At that point, I commiserated with them, and the discussion moved on to other topics.

18. Later in the day, during the course of the meeting, the question of my $10,000 bonus fee was raised. At that point, the Foley problem was mentioned again as Messrs. Zimpel and Silverstein explained to me that while they had plenty of cash in the bank, they anticipated that as part of their year-end business strategy they might need their cash, and if they paid off their guarantees on the $275,000 debt, they would be reluctant to commit to payment of further cash to me at that time. Nonetheless, they emphasized that beyond the payment that they would be making to the two banks, both were upset more because Foley would be totally let off the hook, and would have been the only

partner who would have received "profits" from the transaction, but who made no cash contribution whatsoever.

19. During the conversation, Messrs. Zimpel and Silverstein repeatedly asked for my advice, and I repeatedly stated that I was not sufficiently familiar with Virginia law or the particular conversationally transaction to give a legal opinion. I did tell them however, that I had heard of transactions in Pennsylvania where obligations were not extinguished because they had been assigned to a third party by a bank rather than paid off. I explained that I had not personally handled such a transaction, but that in the cases that I knew of, the third party essentially received a "gift from the debtor" and used that gift to buy the debt, thus avoiding the extinguishment of the debt. I told them that these transac-

tions were discussed openly as a legitimate debtor/creditor strategy, and I was not aware of any reason under Pennsylvania law to invalidate such a transaction although I again reminded them I was neither an expert on commercial paper law or what would be the result under Virginia law.

20. Messrs. Zimpel and Silverstein both informed me emphatically that the Fairfax Associates partnership was defunct, insolvent, and had no funds of its own to pay off the notes. They stated also that under the Fairfax Associates partnership agreement, none of the partners was required to invest additional capital. Furthermore, Mr. Silverstein was only a limited partner. I did not ask to see that partnership agreement and they didn't offer to show it to me because it was clear to all that I not conversing with them about Foley in my capacity as

their attorney, but rather, I was merely acting as their friend while they vented their anger and frustration.

21. Toward the end of that November 1984 meeting, Messrs. Zimpel and Silverstein suggested to me that perhaps I would be interested in trading the $10,000 bonus fee that they owed me in exchange for becoming a "third party" who would obtain the notes from the banks. Their reasoning was that if they could buy my "goodwill" and at the same time pay off their debt to me, they would feel better about paying the banks. When I asked them jokingly why they thought they would be buying my "goodwill", they said that Foley might "get back on his feet" sometime in the future, and then I could recover much more an my $10,000 bonus. I let them know that I did not consider their proposition to be a good investment for me or my lawfirm.

22. Nevertheless, recognizing the difficulty I would have in getting them to pay promptly the $10,000 bonus fee in cash due to the other plans they said they had for their cash, but more, to help my friends and clients overcome their distress of having to make substantial payments to the banks while Mr. Foley paid nothing, I agreed reluctantly and tentatively, (subject to my having discussions with the partners in my law firm) to trade my fee for the bank notes. I asked Mr. Silverstein to check with his local attorneys and the banks to determine if and how such a deal could be structured, and I then left the meeting and returned to Philadelphia.

23. During the next few days, I did not give any thought to the matter. However, on December 14, 1984, Mr. Silverstein contacted me by phone and raise the

subject of transferring the notes and guarantees to me or my firm. He stated that he had promised Sovran Bank (one of the banks to which the notes were owed) the debt would be off its books by year end. I asked Mr. Silverstein if he had obtained an opinion about structuring the transaction, and he said he was working on it. After I hung up from my conversation with Mr. Silverstein, I canvassed the views of the partners in my law firm. The general consensus was that the real "good-will" was not what we would feel towards Messrs. Zimpel and Silverstein, but rather their good feelings about our firm if we helped them. The consensus was that we were skeptical of ever obtaining a recovery, but even if we didn't, we would be helping our good friends, and would, in a quixotic way, serving justice by making Mr. Foley accountable for a valid debt.

24. Mr. Silverstein called me later on December 14th, and I related the views of my law partners. I told him also we did not want to spend a "fortune" on legal fees. He responded that he and Mr. Zimpel would advance the legal costs if my firm could not find an attorney to take the case on a contingency fee basis. I told Mr. Silverstein that I would send him a letter describing my understanding of the transaction, and asked him to show my letter to one of his local attorneys and the banks. If they all approved, he could count me in; otherwise, I would be perfectly happy to forget the deal and wait for him to pay my $10,000 bonus fee. I told Mr. Silverstein I would call him back and read him the letter after it was composed.

25. I conferred with several lawyers in my firm and we drafted the December 14,

1984 letter which became an exhibit in this case. I then called Mr. Silverstein, and in a conference call with him and Mr. Zimpel, read the letter. During that the call I also emphasized certain points. According to my best recollection, I highlighted the following issues in describing the letter;

(A) I reiterated that I was willing to forego the entire transaction and to simply wait for my bonus fee. When they responded that they preferred to go through with it, I read them the sarcastic last paragraph of the letter, which stated,

> "I am grateful for the opportunity you have offered in this innovative fee payment arrangement".

(B) This language was sarcastic because I had communicated my view repeatedly that I thought I was doing Messrs. Zimpel and Silverstein a favor and

that I would much prefer payment of my $10,000 bonus fee. The know I was not "grateful at all because I never expected to collect from Mr. Foley. Moreover, the word "payment" was used sarcastically because, for the sake of good client relations, I was, in my mind, agreeing to an arrangement which was tantamount to forgiving payment of the bonus fee.

(C) I told them that I was relying on them to find out from their local attorneys and the banks how the matter was to be structured. Therefore, in the first numbered paragraph of the letter I was purposefully vague about the mechanics of how the notes would be obtained because I didn't know the appropriate way.

(D) To further indicate my lack of enthusiasm for this deal, in the fourth numbered paragraph I reiterated that they would be responsible for obtaining the

notes and if my firm could not find a Virginia lawyer to enforce the notes pursuant to a contingent fee agreement and, if we therefore asked, Messrs. Zimpel and Silverstein to help, they agreed they would be responsible for the costs of enforcement. My point was that while I was willing to take a business risk for my firm's $10,000, I was not willing to spend much additional money. I said my fear was that if my firm determined that it was not a good business decision at any point to continue to pursue collection, I did not want Messrs. Zimpel and Silverstein to be urging us on (at the risk of losing their goodwill) without having any cost or risk of their own. In my opinion, if they were forced to contribute to the cost of collection, there would be less of a likelihood that they would press us to "beat a dead horse" just to spite Foley or get re-

venge.

(E) In connection with numbered paragraph 5, I emphasized that whatever I got from Foley would be mine (or my firm's) despite what they may have spent to obtain the notes and guarantees in my name. I told them that they should look at this as a real business transaction with my firm and that if they thought Mr. Foley would recover soon, or would pay the notes, they should reconsider the deal. I urged them to discuss this point with their local attorney.

(F) We discussed numbered paragraph 5 and they reiterated that the notes were not subject to any defense. I said that I would rely on what they said to me, but that if their local attorney suggested defenses, they should tell me.

(G) In discussing numbered paragraph 7, I told Messrs. Zimpel and Silverstein

that I was in no position to offer them legal advice about their rights vis-a-vis Mr. Foley because I had never seen any of the written documentation, had examined no records, knew nothing of Virginia's commercial loan laws, and mainly, was specifically acting as a "businessman" in this transaction with the intention of being at arm's length with them. I stated it would not be ethical for me to attempt to be both their lawyer and the person with whom they were entering into a business deal. At this point, I reiterated that they should consult with their own local attorneys because I was assuming that Messrs. Zimpel and Silverstein knew what they were talking about when they said they had defenses and set-offs they could assert to defeat any claim against them Mr. Foley might assert. Since Mr. Silverstein is himself an attorney, I was sure

he understood what I was saying.

(H) I emphasized also in discussing numbered paragraph 7 that it was possible Mr. Foley might sue them if I obtained a judgment and that if Mr. Foley got an award of damages against them, they could not look to me for help. In making this point clear, I stated that it was possible they might end up spending more than the $275,000 needed to acquire the notes because they might end up having to pay something to Mr. Foley, and I urged them to explore this point with their local attorneys. They assured me that they were aware of the risks and would explore the issue. Again, because Mr. Silverstein is an attorney, I did not doubt their assurances.

(I) In discussing numbered paragraph 8, I stated that I was not asking them to sign this letter because it would only be-

come an agreement if they acted on it and fulfilled the conditions. We all recognized that it was merely an offer. I stated that if their local attorney or the bank balked about anything in the letter, or if they decided not to go through with the transaction, they could back out at any time with no hard feelings or penalty. I stated also that if they couldn't do the transaction by April 1, 1985 we should forget about it and they should simply pay my bonus fee. They agreed.

26. I ended the conversation by saying that I would wait to hear from them. At that point, I knew nothing about any requirement in Virginia or any other law that I would be obliged to sue the partnership or Mr. Zimpel in his capacity as general partner before obtaining a judgment against Mr. Foley on his guaranty, and therefore, the issue was not

discussed.

27. It was my view that this was a perfectly legitimate business transaction. Messrs. Zimpel and Silverstein spent hundreds of thousands of dollars and Mr. Foley had taken out hundreds of thousands of dollars. There was a valid debt that Mr. Foley had guaranteed. He clearly had a valid obligation to the banks. I was paying $10,000 for a highly speculative claim against him. The banks would be getting real dollars for the assignment of the notes to me.

Between me and Messrs. Zimpel and Silverstein, I was giving value and they were getting: (a) payment of what they owed me; (b) good relations with banks they dealt with regularly; and (c) the satisfaction of knowing Mr. Foley was not getting a free ride. Thus, the transaction seemed a fair and beneficial business

deal. Moreover, because the Fairfax Associates had no funds, and no partner had an obligation to put in more capital, it was clear that no partnership money would be or could be claimed to have been used or that the partnership was satisfying its debt. As a result, Mr. Foley's obligation would be the same to me as it was to the banks; it would not be increased. Finally, I could see no legal, ethical or moral reason why Mr. Foley should enjoy a benefit from additional personal funds spent by Messrs. Zimpel and Silverstein when they did not wish to confer any benefit to him. The transaction was to be open and above board, and full disclosure was to be made to the banks; the transaction was also documented openly in my letter of December 14, 1988. When I considered whether there was anything improper or unethical in the arrangement, I con-

cluded there could be no claim of fraud or "sharp" practices because the equities seemed to be all on our side.

28. I did not think about this transaction any further until sometime near Christmas of 1984. Mr. Silverstein had attended a DEG Christmas party in Malvern, Pennsylvania and either I attended as well and we spoke there, or he called me about it. During that conversation, Mr. Silverstein advised me that he had made arrangements to purchase a cashier's bank check in my name from Sovran Bank and that this bank check would be used to buy the note guarantees for me. (Sovran was one of the banks to which the money was owed.) The discussion about this subject was quite brief, but I recall that he said that Sovran Bank thought this was the best way to do the transaction and that it wanted the loan off of its books

before the New Year. I replied that I would await further developments and that if Messrs. Zimpel and Silverstein were satisfied with the arrangement, I was willing to proceed.

29. On December 31, 1984, Mr. Zimpel called to wish me a happy New Year, and in passing mentioned that he had deposited his and Mr. Silverstein's checks in the Fairfax Associates' account. I asked him why he did that and he said that he thought it was as good a way to buy the note for me as any other. I asked if he had conferred with Mr. Silverstein and he replied that Mr. Silverstein was "running around" and that he had left a list of things for Mr. Zimpel to do, including "buy notes for Gary". I advised him to check with Mr. Silverstein because he had advised me of a different arrangement he had made with Sovran Bank. I speculated

that if a Fairfax Associates' check was used, the intended benefit of the transaction (keeping the debt alive so it could be transferred to me) might be frustrated; I specifically did not tell or advise Mr. Zimpel to withdraw funds from the Fairfax Associates' account but rather, merely suggested he confer with Mr. Silverstein.

30. I did not have any discussion about the notes nor did I think about them again until sometime in 1985 when the original Sovran note and guaranty was received by mail or Federal Express delivery in my office from Sovran Bank. I assumed that Sovran Bank would not have issued the note and guarantees to me if they were invalid and I had no suspicion that a claim would be made that the Fairfax Associates' debt had been extinguished. If there was a cover letter that came with the note and

guarantees, I did not retain it and, therefore, do not know the exact date. I put the Sovran note and guarantee in my firm's safe. (I do not recall any of the circumstances involving the Crossland Savings note and guaranty.)

31. In the Spring of 1985, one of my law partners came across the notes and guarantees in our safe and asked me what I intended to do with them. I responded that since Mr. Foley appeared to be insolvent, I intended to just hold the notes and guarantees. He then convinced me that it was important to at least have a judgment entered on the guarantees since if Mr. Foley filed under the bankruptcy laws we would then be listed as a creditor, or if he became solvent we would not have to wait to collect. I agreed to proceed.

32. I contacted Lawrence E. Freedman, Esquire because in the mid-1970's he had represented a group of Virginia based defendants in a lawsuit I had filed in the United States District Court for the Eastern District of Pennsylvania on behalf of the plaintiffs. Mr. Freedman impressed me as a worthy opponent in that case, and he was the only lawyer I knew personally in Virginia. I offered Mr. Freedman the case and he accepted, albeit not on a contingent fee basis.

33. On August 19, 1985, I forwarded Mr. Freedman the guarantees and notes.

34. On April 7, 1986, Mr Freedman sent to me by mail a copy of a complaint he had drafted against both Mr. Foley and his wife (who had signed a guaranty). I had no hand in drafting this document. I

glanced through it upon my receipt, and then handed it to an associate in the office for the purpose of determining whether it was appropriate. I had determined in my own mind that this was a low priority matter due to my belief (later confirmed by Mr. Foley's deposition) that he had no attachable assets and even obtaining a judgment could be a futile gesture.

35. In his cover letter forwarding the complaint to me, Mr. Freedman had asked for my comments. I do not recall making any, nor giving any further thought to the complaint, other than perhaps to learn from the associated that the complaint seemed adequate, although some of the terminology seemed old. [In retrospect, on reading the complaint now I see that if differs markedly from the style I

and my firm uses. For example, we do not use the work "count" until after we have described the facts central to all counts; we have a set formula for pleading jurisdiction and venue in a diversity case which does not look at all like Mr. Freedman's; I would not have readily used the words "bona fide purchaser of the notes" because that term does not seem appropriate in the context of a commercial paper case under law I am familiar with; and I would have referred to the parties as "citizens" of their states rather than refer to their "residence". (See, Complaint at Paragraph 1)]

36. I expected Mr. Freedman to be conversant with the law of Virginia and thus, for example, when I saw "bona fide purchaser" used in the complaint he drafted, I assumed it was a term used in

his jurisdiction that could be equated with a "holder", which I thought I was. Similarly, the first notice that I had there was a law in Virginia (Section 49-26 of the Code of Virginia) that required that upon demand could be made to sue the Fairfax Associates partnership and Mr. Zimpel as the managing general partner, occurred on October 24, 1986 when Mr. Freedman forwarded to me a copy of a letter dated October 23, 1986 from a John R. Hartnet, Esquire, counsel for Mr. Foley.

37. I had no knowledge of Virginia Code and that is why I retained Mr. Freedman. However, because he had never raised Section 49-26 of the Virginia Code in our discussions, I had one of the associates in my firm research the issue. I received back a research memo which indicated that Virginia was among a small group of juris-

dictions that had such a law. However, it appeared that a good case could be made that Mr. Foley waived the protection of the law by the language in the guarantees. Also, other reasons for the non-application of the law were more than arguable.

38. Nonetheless, I immediately contacted Mr. Zimpel and advised him that I might be obliged to sue him. I stated that if he objected, I would accept my $10,000 bonus fee and drop my action against Mr. Foley, or if he didn't object I would proceed as required. I told Mr. Zimpel I would try to avoid suing him, but could not assure him that a suite could be avoided. Mr. Zimpel, after conferring with Mr. Silverstein, said that in any suit, he was convinced he would be able to shift full liability to Mr. Foley and he said he would assume the risk of my suit.

39. I contacted Mr. Freedman and told him to start suit against Mr. Zimpel and Fairfax Associates in state court as a protection, but to press the waiver argument in the Federal Court suit. I instructed him further to not notify Mr. Foley until necessary because it might be possible to drop the suit if the waiver argument prevailed. Mr. Freedman and I agreed that Mr. Foley was not a necessary party in the state court suit because he had already been sued on the note and guaranty in Federal Court, and another suit against him for the same paper would be redundant and could be deemed harassing. Furthermore, I did not want to be viewed as conceding that such a suit was necessary absent a ruling from this court.

40. Mr. Freedman suggested that since my firm had researched the issue, we

might write the first draft of any reply to a Motion to Dismiss that Mr. Foley might file relating to Section 49-26, and I agreed.

41. I assigned an associated in my firm the task of monitoring this aspect of the case and later, when the issue was raised by Mr. Foley, my firm did write the first draft of the reply brief. We also drafted my summary judgment motion.

42. On or about June 7, 1987, I received copies of Mr. Foley's first written discovery requests. An associate in my office working on this case was assigned the task of assembling and preparing answers. It was my intention to provide <u>all</u> of the information requested and to do so as soon as possible since I had nothing to hide.

43. With a cover letter dated June 19, 1987, we sent Mr. Freedman complete answers, responses and documents, including a copy of the letter dated December 14, 1984, which letter became part of the record which satisfied all of Mr. Foley's written discovery requests. While these responses were not due until July 7, 1987, it was my goal to have them produced before the deadline. In fact, Mr. Freedman delivered them on July 2, 1987.

44. The Fourth Circuit's harsh descriptions of this transaction shocked me. I know now and believed in 1984 that no Fairfax Associates' money or assets were ever used to buy the cashier's check which was then used to obtain the notes and guarantees. Moreover, at no time did I have any reasons to believe that any

Fairfax Associates' partnership funds or assets were ever used to buy the notes and guarantees or that such a defense would be raised, let alone adopted by the Fourth Circuit because Fairfax Associates was totally insolvent and Messrs. Zimpel and Silverstein had assured me that they were using their personal money to buy the cashier's check for me. They were not quite wealthy in 1984 and even if they had given me the cashier's check it would not have been a fraud on any of the creditors. The deposit of funds by Zimpel into the Fairfax Associates account was to me an obvious mistake; he would obtain not one benefit by intentionally depositing money into the Fairfax Associates' account and he could have suffered the detriment of losing the pay-off of my $10,000 bonus fee. [I have since learned from reading David Gunn's deposition that he, as the

party representing Sovran Bank, had no knowledge of Zimpel's mistaken deposit of funds into the Fairfax Associates' account nor did he ever believe that Fairfax Associates' funds were used to buy the cashier's check. Mr. Gunn always thought that the personal funds of Messrs. Zimpel and Silverstein were being used to buy the cashier's check in my name. More importantly, the Gunn deposition shows that the deposit into the Fairfax Associates' account was totally irrelevant because Mr. Gunn debited the personal accounts of Messrs. Zimpel and Silverstein to purchase the cashier's check in my name which was used to buy the notes and guarantees.]

45. There was no attempt to hide any part of the transaction nor to "launder" money or perpetrate a fraud. The same is true in the conduct of the litigation.

This entire transaction was open and fully documented. My December 14th letter set out the plan and we produced that letter, willingly, in discovery before it was even due. [I do not know what Mr. Freedman had in mind when he stated that my December 14th letter was produced by mistake. This comment appears in the transcript of the Zimpel deposition taken in the state court proceeding. I was not present. However, the hard evidence shows that no mistake was made; as my written answers to the request for documents show, I fully intended to produce the letter, willingly.]

46. The cashier's check was purchased openly, with full disclosure to Sovran Bank of its intended use and the purpose of the transaction. The use of the cashier's check which was purchased with funds debited directly from the per-

sonal accounts of Messrs. Zimpel and Silverstein merely documented that these funds were specifically not intended to be viewed as Fairfax Associates' assets or a payment by the guarantors of their debt. Moreover, Mr. Silverstein was not a general partner in Fairfax Associates yet more than $93,000 was taken from his personal account to purchase the cashier's check.

47. Nothing in the transaction defrauded Mr. Foley; his defenses and cross-claims, if any, against Messrs. Zimpel and Silverstein were unaffected. He had no right to defend on the ground that the debt was extinguished because it was not. I paid the bank with a cashier's check bought for me, in my name. That check cost me $10,000. Mr. Foley did not con-

tribute any of the funds used to buy that check.

48. Nothing in the litigation was fraudulent or unethical. We provided our responses and answers to discovery when asked, and before they were due. Under Rule 8 of the Federal Rules, we pleaded a short, plain, truthful statement of our contentions; we were not obliged or even allowed to anticipate defenses. In my view, I was in direct privity with the banks. Since Messrs. Zimpel and Silverstein did not use partnership funds, and intended to not get any benefit by having the notes and guarantees assigned to me (other than the payment of the bonus fee), I saw the mechanics of the note, at the complaint stage, as irrelevant.

/s/GARY GREEN

Sworn to and subscribed
before me this 28th day
of _____, 1988.

/s/ Notary Public

**APPENDIX O**

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
Alexandria Division

GARY GREEN,

Plaintiff,

-vs-

CIVIL ACTION
NO. 87-350-A

MAURICE P. FOLEY, et al.,

Defendants.

Friday, December 2, 1988
Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR.,
Judge, United States District
Court

APPEARANCES:

FOR THE PLAINTIFF:

JOHN TOOTHMAN, ESQUIRE
OF: JOHN D. GRAD & ASSOCIATES
112 N. Columbus Street
P.O. Box 1417-A44
Alexandria, Virginia 22313

FOR THE DEFENDANTS:

JOHN HARTNETT, ESQUIRE
OF: BRINCEFIELD ASSOCIATES
526 King Street, Suite 423
Alexandria, Virginia 22313

* * *

DON McCOY, RPR
OFFICIAL COURT REPORTER
683-3668

ALSO PRESENT:

LAWRENCE FREEDMAN, ESQUIRE
OF: FREEDMAN & HOPKINS
10560 Main Street
Fairfax, Virginia 22030

P R O C E E D I N G S

THE CLERK: Civil Action No. 87-350-A, Gary Green versus Maurice P. Foley.

THE COURT: This comes on on the defendant's motion for Rule 11 sanctions, the plaintiff's motion for sanctions, an

appeal of the Magistrate's order, and the plaintiff's motion for relief from judgment of the Court of Appeals, which frankly I am not going to entertain argument on. There isn't any way I can relieve you from the judgment of the Court of Appeals.

MR. HARTNETT: John Hartnett for Maurice Foley. Good morning, Your Honor.

THE COURT: Good morning.

MR. FREEDMAN: Your Honor, I just mentioned to Mr. Hartnett -- Larry Freedman -- I am here at this point representing my own interests. I'm not representing Mr. Green. He has separate counsel and has had for some time.

MR. TOOTHMAN: That's correct, Your Honor.

MR. FREEDMAN: I did file a written response, Your Honor.

THE COURT: Has any relief been

sought against you personally?

MR. FREEDMAN: Yes. I believe in the Rule 11 they are requesting something from me. I have filed a written response in the form of an affidavit. I hope it has reached the Court. It went out early this week.

THE COURT: I am not sure.

MR. FREEDMAN: It's in the file, Your Honor. I have a copy if the Court doesn't have it.

THE COURT: I have it.

MR. FREEDMAN: What I said to Mr. Hartnett was I want to supplement that. I'll do so under oath if the Court requests. One thing I forgot to put into that was at the time that I began to represent Mr. Green and was investigating the claim that he was giving me to represent him, I inquired of Mr. Green as to whether there were any possible defenses that Mr.

Foley might have as to this claim.

Now, first, as the Court is aware, Mr. Green himself is an attorney in Philadelphia and has dealt extensively in commercial matters for many years. His response to me was that there was potentially a cross-claiming situation between Zimdel, Silverstein and Foley (phonetic) under a partnership agreement that had nothing to do with Green, but there were no defenses that he was aware of at all. He had purchased the note. That was that. The note hadn't been paid. There were no defenses he was aware of at all to the claim.

I would just add that to what I put in my previous motion, because I had forgotten at the time I wrote that up of that inquiry that I did make of Mr. Green back at the beginning. Thank you.

THE COURT: Let me hear from the

plaintiff. I think frankly that the Court of Appeals has left this case in a posture that I have very little choice but to impose sanctions. I am certainly not going to reexamine the facts underlying this case. The Court of Appeals has held that there are no material facts in issue. I don't know that I have the authority, and certainly I don't have the inclination to reexamine that. I will let you respond to that, sir.

MR. TOOTHMAN: John Toothman. I represent Mr. Green.

Your Honor, the problem is that this is a very serious situation. The facts, the Fourth Circuit believes it has found the facts that show fraud and referred the matter to a bar disciplinary proceeding. We are here now today on a Rule 11(a) motion for over $65,000. Mr. Green, because of the posture of the case, never got to

tell his side of the story.

THE COURT: Well, but that's something that I assume was presented to the Court of Appeals.

MR. TOOTHMAN: But, Your Honor, we are saying that it was not, because we followed the procedures, and they were not presented to the Court of Appeals.

THE COURT: Why weren't they?

MR. TOOTHMAN: Because the record before Your Honor was that we decided the case as a matter of law on the summary motion. There were then two subsequent attacks by Mr. Foley through reconsideration and a Rule 60(b) motion to try and shake Your Honor's decision, and Your Honor was not shaken.

THE COURT: Didn't you also make the same request for rehearing and so on before the Court of Appeals?

MR. TOOTHMAN: I didn't hear the

first part of the question.

THE COURT: Didn't you also make requests for rehearing and further consideration before the Court of Appeals?

MR. TOOTHMAN: Yes, Your Honor. We also requested leave to supplement the appellate record, which was also denied.

I can answer the specific question or the premise of your question fairly quickly.

In our brief, in a footnote we presented the basis upon which this Court could conclude that it is not bound by the findings of fact of the Fourth Circuit, if this Court concludes that it would not be just to do so.

I am trying to present a basis for this Court, not to secondguess the Fourth Circuit but to see that justice is done.

Your Honor, it disturbs me that you feel that your hands are now bound when

before you ruled in our favor. Before, you ruled that we had a meritorious claim, and certainly a meritorious claim --

THE COURT: The Court of Appeals said I was wrong, and we have to live with that. You might think that I was right and the Court of Appeals was wrong. We don't have that luxury.

MR. TOOTHMAN: Well, Your Honor, I am about to discuss why you do have that luxury or that duty, but my initial premise is that it is not just a matter of some people win and some people lose. There are very devastating consequences flowing from the fact the whole story was never told and only half of the story has been told through irregularities in the proceeding.

At page 10 of our brief in footnote 11, there is a discussion of the exception to the law-of-the-case doctrine. This

Court does not necessarily have to follow blindly the mandate of the Fourth Circuit. Your Honor has a separate duty to do what is just, and then the Fourth Circuit can correct Your Honor if it feels that you have made a mistake. It disturbs me that the process is now running so fast and running without any consideration of the merits anymore that Mr. Green is being deemed to have done something that he has never been heard on and which isn't the fact. It isn't the fact that he did anything fraudulent. It isn't the fact that he structured this transaction. It isn't the fact that this note was paid off.

But because of the presumptions of the judicial process, which are designed in the overwhelming majority of the cases to insure one full fair hearing but only one and not belabor the point and have them dragging on through repeated hear-

ings, that at least you will be heard one.

Mr. Green hasn't gotten that hearing. Your Honor, I believe if you reviewed his affidavit and the excerpts of the depositions that we have called the Court's attention to in the brief, this shows what a travesty of justice has been wrought here.

THE COURT: But the Court of Appeals didn't remand it to me with a direction to entertain a hearing on the merits. They remanded it to me with a direction to grant summary judgment to the defendant.

MR. TOOTHMAN: But only that, Your Honor. There isn't an express direction from the Court of Appeals to enter sanctions.

THE COURT: I agree with that.

MR. TOOTHMAN: I am concerned, Your Honor; we are going to take our licking here. We are not asking to overturn this whole situation. We just want to avoid

through the 60(b) motion and through our opposition to sanctions, all these presumptions that are now flowing from facts found by the Appellate Court on half a record. Your Honor is a trial level Court. You are accustomed to finding facts. In this case, we never got to tell our side of the story. And because we followed the appellate rules we didn't throw in these depositions -- in the appellate record without first seeking leave. That's the problem. The other side did. And so their facts were found and were said to be contested. Or were uncontestable.

But they are not uncontested, Your Honor. We just followed the rules. The facts that the Appellate Court found were just not the facts, Your Honor. Mr. Green is being made -- he is a partner in a Philadelphia firm. He is now in great

jeopardy of losing not just his livelihood but his entire professional reputation because he came into this Court to enforce a note that he took for some client of his as a favor. He did them a favor to take that note in $10,000 in hard fees that he could have insisted on payment of and now the man is being told he committed a fraud in Court. He is a very honest, reputable attorney, Your Honor. To say that the wheels of justice are now so greased that we can't possibly slow down to find out what really happened here and to cause all these things to flow from one decision of the Fourth Circuit, all I am saying is that Your Honor really does have discretion to examine the justice of the situation.

THE COURT: I am sure I do but I am not willing to reexamine the total merits of this lawsuit.

MR. TOOTHMAN: I am not asking for that specifically, Your Honor. Our 60(b) motion, Your Honor, is designed to say that because of all the facts that are flowing from this decision, of the Fourth Circuit, that we believe we should be entitled to put this information into the record and that if this Court were to determine that there is a real factual dispute, I believe that it would be within the Court's power under Rule 60(b) to order the trial take place. We are not saying you should reverse the Fourth Circuit but just allow the facts to be heard.

Your Honor, it is a very grave situation. It's a scary situation in many respects because it's the kind of situation that if you read particular Mr. Green's affidavit, you can see how at every step of the way, he was doing the logical thing, the rational thing, the legal

thing, the thing that an attorney ought to be encouraged to do and yet now all of a sudden the mousetrap has struck and he is a gentlemen who is coming out of a Kafka novel now.

He doesn't know whether he is ever going to be able to convince the Court to pay attention to his plea that he didn't do anything wrong. He is being told in the Pennsylvania Bar proceeding, we are not going to make a de novo review either. They are going to take all those facts. The Fourth Circuit did the same thing, and the Supreme Court undoubtedly, in considering, which we are planning to file --

THE COURT: I don't know about that body but I think I do have to take the facts that the Court of Appeals found as true. I don't think that applies the sanction which I have in my discretion but I don't think I have the luxury of reex-

amining facts the Court of Appeals has found.

MR. TOOTHMAN: I believe you do, Your Honor, if justice requires it. What I am saying is because there is only half a record here and if you would look at the factual submissions we have made to examine them, you might be convinced that the factual determinations by the Fourth Circuit could have been in error because of the procedural irregularities and on that determination, I am not suggesting that you are supposed to reverse the Fourth Circuit. But if you find that there has been injustice, it is incumbent upon you to at least allow us to make that record and to suggest perhaps that from your perspective looking at the facts that you have looked at you have some question. If you can do that, then it may be possible to shake some of these otherwise

intransigent alternatives that are now befalling Mr. Green and jeopardizing him when as I said the man never took the stand. He never was deposed. He never had his day or couldn't explain what happened and now everybody is presuming he is a fraud.

THE COURT: The Court of Appeals said it. They said he was clearly guilty of fraudulent -- I forget what the language is -- but you will recall it, I'm sure.

MR. TOOTHMAN: Yes, sir.

What it is, Your Honor, was it applied the Rule 60 standard for reconsideration or relief from the judgment, and used the prong of a fraud on the Court is the way I would quickly describe it. A necessary finding in the course of that was that they found misrepresentations to Your Honor specifically. Now, if Your Honor will recall and certainly our plead-

ings have made it clear at the time that Your Honor was considering this question not once but three times before it went to the Court of Appeals, you have in front of you all the documentation that the Court of Appeals then found showed fraud, on this Court.

Now, the interesting irony is how could it have been a fraud on this Court if this Court had in front of it all the information? Fraud on the Court requires hiding or misrepresenting to the Court but the documents used by the Fourth Circuit were also before this Court.

Another concern of ours, Your Honor, is that Mr. Green is basically being hoisted upon his own statement. He is being accused of committing a fraud on this Court. Your Honor might say he has been found to have committed a fraud upon this Court by the Fourth Circuit. Yet he

is being hung by his own statement. If the man were a fraud on the Court, he would have hidden it. He would have destroyed something. But what did he do? He provided in discovery the very things that are now being used against him. He produced them not only in a timely fashion. He didn't have to be compelled to answer these questions. He willingly produced this information before it was due. He had at least three or four more days before the discovery was due to be filed but he filed it early. How is that evidence that the man committed a fraud on the Court? It's a very scary situation, Your Honor, because all he did was follow the rules and now he is being told that because they delayed taking their discovery, because they did not make the argument sooner, he committed a fraud on the Court, and made misrepresentations to them but he

never did that. He never made any misrepresentations to them.

He wasn't even deposed. His pleadings although they use some phraseology which doesn't really apply to the situation, referring to the phrase "bonafide purchaser," there is no such thing as a bonafide purchaser of a note. There is a holder or holder in due course. Bonafide purchaser is an Article 2 concept. Holder and holder in due course are analog in Article 3. But for some reason he is being told because he claimed to be a bonafide purchaser, he somehow defrauded the Court and defrauded the defendant.

But that's not the case. He gave $10,000 in value for that note. Your Honor, for those reasons, not only do we believe that this Court's hands are not tied on the subject of sanctions, particularly in terms of the finding of facts,

but also that this Court could grant the 60(b) motion.

Your Honor, are also aware that we have requested an evidentiary hearing on this matter, because we believe that before $65,000 more in sanction can be awarded --

THE COURT: Well, I haven't arrived at any figure.

MR. TOOTHMAN: I understand.

THE COURT: I understand that's what is being requested. All right.

MR. TOOTHMAN: Let me -- I would like to go through the Rule 11 and list from another thing. Your Honor is aware I contend there is no basis for Rule 11 sanctions on the question of whether Mr. Green misled the Court about the facts, because I believe that he didn't. If he were allowed to tell his side of the facts in fact --

THE COURT: I am not going to let you reexamine the facts that I find the Court of Appeals has already decided. One of those is that in his pleadings, Green consistently and materially misrepresented his status as a holder of the note, claiming that he was a quote "bonafide purchaser of the note for value."

Now, that is a fact that I don't think I can reexamine to determine whether it's true or not. It's a finding that I don't think I can reach.

MR. TOOTHMAN: Your Honor, would you consider in the alternative though issuing some sort of finding that if you were allowed to consider the fact --

THE COURT: No.

MR. TOOTHMAN: I didn't think so, Your Honor.

There is another aspect of the Rule 11 sanction question, not only can one be

sanctioned for misstating the facts, and I contend we did not although there is some dispute about that and perhaps none, the other argument is also whether we were making allegations that were clearly frivolous under the law at the time. The Fourth Circuit again makes it sound as though the law was very clear, but yet they only cite one Virginia Supreme Court case that is factually distinguishable from the 1940's before the Uniform Commercial Code was even in effect.

Yet in our reconsideration motion to the Fourth Circuit, we pointed out a 1981 case from the Supreme Court --

THE COURT: Why go through this exercise? I haven't the authority to reexamine whether the Court of Appeals was right.

MR. TOOTHMAN: But, Your Honor, in a sense having to examine that question from

another perspective in deciding the separate question which again was not decided by the Fourth Circuit yet, that whether these things were so bad that sanctions have to be entered. You have an independent duty at this juncture to decide the question of whether sanctions need to be entered.

THE COURT: I agree with that.

MR. TOOTHMAN: In considering that, we are not supposed to be bound any way in a determination of our bonafides in making the arguments. Just because we lost, not every litigant who loses on an appeal, particularly a litigant who won who are going to be sanctioned under Rule 11. That may be even true for all 60(b) motions that are granted on appeal based on fraud.

Just because the Court determines that there may have been some misrepresen-

tation to the Court, it isn't a fortiori that that is a ground for Rule 11 sanctions.

Once again, Your Honor, I am going back to the fundamental concept of due process. This Court may feel bound by the Fourth Circuit's decision. I have cited cases that suggest that it is not, if it's necessary to avoid an injustice. Mr. Green should be heard, not just because for an institutional reasons this court should follow a superior Court. That is an important reason but the due process clause and the concept of giving a person a day in Court before serious sanctions are entered against him is an even more fundamental concept. I believe the orderly institution of -- or orderly relationship between this court and the superior Court must spend some time to the dictates of due process.

That's why we feel this Court should make its own independent determination taking into account the Fourth Circuit facts and so forth, its own determination of the bonafides of Mr. Green before it enters the sanctions which can be devastating to the career of any attorney, particularly a person who has no other -- no opportunity to be heard, no blemish on his record. It's a very scary situation, Your Honor.

Your Honor, may I review my notes to see if there were any other points I wanted to make?

THE COURT: Yes.

MR. TOOTHMAN: Your Honor, there were several statements in the brief of Mr. Foley that I would like to call to the Court's attention to show that there are over, far far overstatements of even what the Fourth Circuit which made a very

strong finding against Mr. Green said.

Particularly I believe the best example is at page 17 of their brief in which they say quote, "Plaintiff and his counsel actively prohibited defendant from discovering said defendant, meaning the payments of defendant -- "Are fraudulently pleading the claim and intentionally failing to disclose the true nature thereof."

There is a situation in there that says intentionally failing to disclose the true nature of the claim. Your Honor, we gave the discovery. It was then used to hang us. Mr. Green did not--

THE COURT: You have already pointed that out.

MR. TOOTHMAN: I'm sorry, Your Honor.

Your Honor, I also wanted to emphasize it is in our brief, at pages, in a couple of places though, that Mr. Foley in arguments that he had made previous to the

relation of a letter which the Fourth Circuit found to be so compelling, has even in his answer for instance pled payment and satisfaction and discharge of the note, so therefore once again, the suggestion that we made misrepresentations upon which he relied to his detriment cannot possibly be correct because the gentlemen pled the very defenses that he claims we denied him the ability to plead.

Your Honor, unless you have further questions, I have no further argument although I am again, I am not waiving my contention that I should have been allowed to present evidence.

MR. FREEDMAN: Did Your Honor want to hear from me next or from Mr. Hartnett? We are sort of out of sequence here.

THE COURT: I asked counsel for the plaintiff to be heard first. I will hear from counsel for the defendant.

MR. HARTNETT: May it please the Court, there are I think five motions that have been noticed today. I think the Court has already indicated it feelings as to most of those.

THE COURT: Well, they all revolve around the same issues.

MR. HARTNETT: Yes. We have filed preliminary objections to several of the motions filed by Mr. Green just due to the timing of them since we received those motions on Wednesday and they were noticed today. I am prepared to withdraw those objections and we can argue them because I think they do all address the same issue which is an attempt to reopen a record which I don't think that anybody here has the power to do. I think we have got a conclusive record.

One objection we would not withdraw, however, Your Honor, and I think it's one

that you do need to rule on today, is this submission of some four deposition transcripts by Mr. Green. They are approximately two inches thick, and it is an attempt to again reopen the record and belabor that. These depositions were not part of the case that was sent to the Fourth Circuit by an agreed designation of the record, not just a unilateral one. There was an agreed designation of the record. These depositions were available to Mr. Green, some of them as much as nine months before the hearing and the earlies of them at least 30 days before the hearing.

I would point out as to the attempt generally to reopen the record, and I understand Your Honor's point of view on that, and I think it's the correct one, that throughout all of these proceedings in the Fourth Circuit, there was a designation of the record which we have at-

tached as a supplement to our pleadings that object to the use of these four deposition transcripts, an agreed designation of the record.

That agreed designation was pending for perhaps seven months. There was never any effort to dispute anything on the record and in fact the case that was submitted to the Fourth Circuit was submitted on an agreed set of facts and it was merely the interpretation of those facts that was in dispute.

I think the Fourth Circuit has ruled on that. Subsequently there is an adverse ruling to Mr. Green and suddenly he says that there are facts that weren't brought before the Court.

It's not so. But separately, Your Honor, I think you are bound by the mandate, as are the parties here. So we would ask that you deny the 60(b) motion,

Your Honor.

I would also point out that Mr. Green has filed a motion for sanctions of his own against Mr. Foley.

THE COURT: That's just the best defense is an offense.

MR. HARTNETT: That's my opinion, too, Your Honor, and I think it's blocking for a 60(b) motion. I think that's exactly what it's for.

I think for the same reasons that inform a denial of a 60(b) motion, the motion for sanction also must be denied simply because it attempts to reopen a record that is contrary to the mandate and it's contrary to the agreed designation of the record that was submitted to the Fourth Circuit by myself and Mr. Freedman as Mr. Green's counsel. Mr. Green had his opportunity to be heard. He has been caught.

I would continue, Your Honor, that as to the other matter which I think requires a denial is this appeal of Magistrate Brinkema's ruling which again turns on the same set of argument which is an attempt to depose me, as Mr. Foley's counsel and to depose Mr. Foley, not for purposes of addressing a sanctions motion but rather to reopen a record and to protract and to prolong this litigation, which has already cost Mr. Foley a tremendous amount of money in Fairfax, here and in the Fourth Circuit, all attributable to Mr. Green.

Your Honor, if I might, I would just now ask that every one of the motions filed by Mr. Green be denied as part of the Court's ruling today; and if I might, I would just now like to move on to the issue of the appropriateness of sanctions and the quantum of sanctions that should be imposed.

THE COURT: Briefly, because this --

MR. HARTNETT: Briefly, Your Honor. I think virtually all of the arguments that I would make here are contained in the brief, but I would remind the Court about one in particular that is contained in our supplemental memorandum in support of the motion for sanctions.

That is if I might just quote to the Court very briefly that when the Federal Courts are used for a manner inimical to their purpose, Rule 11 has been violated.

That is a quote from the Easy Way Construction Case (phonetic) that we quoted in our supplemental memorandum in support of the motion for sanctions.

I would also point out to the Court that where, as here, the initial pleading, the complaint, is itself fraudulent, and I think that the facts are conclusive that they are fraudulent, that every other

pleading, and there have been many, numerous, not just in the Court of Appeals, but over in the Fairfax Court in a matter that is directly related to a defense raided by Foley in this Court, and in fact Mr. Green's affidavit bears that out, that where that occurs there is a violation not only of that original complaint, but of every other signed pleading and the proceedings stemming therefrom. That is why we have claimed all of Foley's fees in this multilevel litigation as appropriately recoverable pursuant to Rule 11.

THE COURT: Is it appropriate to grant all those fee? That is a fairly substantial sanction. A sanction is a deterrent type of thing.

MR. HARTNETT: Your Honor, I agree with you that a sanction is a deterrent, however the cases that we cite to you also cite in addition to the purpose of deter-

rence, the purpose of compensation of the injured party here, Foley, to the tune as I say of some $78,000, and also the purpose of punishment; and I think all three of those purposes have to be examined within the context of Mr. Green's conduct and perhaps Mr. Freedman's. I accept Mr. Freedman's representation that he spoke, and this is the first that I heard of that, but that he spoke with Mr. Green, and Mr. Green assured him that there were no defenses and that Mr. Green had paid the banks. In fact we know that that was not the case. I think the Court can make a distinction perhaps as to whether Mr. Freedman was taken in in the same way that Mr. Foley was taken in.

But that's not within our purview here. We have asked for joint and several sanctions. I think that what's appropriate here is the examination of the conduct

that brought about this large, large number of legal fees. I think that we should keep in mind that the Fairfax forum was chosen by Mr. Green when there was a case already pending in this forum, and he simply could have filed here and had the cases tried together. But he did not do that. He chose the Fairfax forum, and he said so in his affidavit, in order to hide the fact from Foley that he was worried about Foley's defense of the Virginia notice statute.

Mr. Green in his affidavit also states that he instructed his lawyer, Mr. Freedman, not to let Foley know about that other file. But there is a direct link between the action over in Fairfax, and that matter is still pending, Your Honor. That matter, and the case in this Court, and I think the Rule 11 sanction reach all of those, because we have a three-fold

purpose of number one, I believe to be a deterrent for the offending party; number two, I believe the cases show that there should be compensation to be offended party, here Foley; and number three, I think that there is a punitive purpose and we have been told that Mr. Green is a partner in a prestigious Philadelphia law firm. We are told that he has grave consequences at stake. We think that they ought to be grave, because we think that the conduct here is egregious.

If you want to deter Mr. Green and if you want to punish Mr. Green and most importantly if you want to compensate Mr. Foley for this bad case, you should give him all of his fees and we would ask that that order not just include all of the fees in this Court, in the Court of Appeals, and the Fairfax case, but that that be until this matter is concluded, because

as you can see from the record in front of you, just of the past week, Mr. Green has continued to paper this Court and to paper Mr. Foley with numerous motions. He is not going to stop. I think this matter needs to be concluded but I think it's pretty easy to see when they are talking about a petition for a writ of certiori and we are talking about a ruling in this Court today, that they are planning on taking this thing as far as it can go to protract it as far as it can go for purposes of delay.

I think that Mr. Toothman knows, he doesn't have any chance of ever getting any other ruling than the one he has got but that's not stopping them. And that is the way these people do business, Your Honor. You have got to teach them a lesson. That's all I have.

THE COURT: Mr. Freedman?

MR. FREEDMAN: May it please the Court, my position in this matter of course is a little bit differently structured than the other litigant to it. Mr. Green came to me asking me to represent him to pursue some notes that he had purchased and had not been paid. As my memorandum in affidavit set out he provided me information that verified in fact he had a claim, verified that he had no statement endorsed over to him. He verified that he had paid consideration for them, and in fact when I inquired of him as to whether Mr. Foley had any potential or his wife also was included in that conversation, that is whether Mr. or Mrs. Foley had any potential defenses to the claim made, to be made by Mr. Green, I was informed no, that there weren't any, that the only litigant possibility would be a series of cross claims between the part-

ners to the partnership, that is Zimdel, Silverstein and so forth.

Your Honor made your ruling in this Court when we requested summary judgment based upon the guarantee of the note. That was Your Honor's ruling, based upon the guarantee of the note.

That Friday morning that we came in to argue both the motion for summary judgment filed by Mr. Hartnett and the motion that I had filed as well, we came forward. He had filed some requests for discovery prior to that time. The discovery wasn't due until the middle of the following week, but because I knew I would be seeing him here and because the responses and the documents and other information is voluminous, I handed it to him here in Court in this courtroom prior to our argument on motion for summary judgments.

Contained in that package of mate-

rials that I gave to him was the letter that the Court of Appeals has made such movement of and is the foundation of Mr. Hartnett's claims. When I handed it to him or just prior to handing it to him, it was the first time I had seen it. I didn't know of its existence prior to that time.

Subsequent to that time, Mr. Hartnett on behalf of Mr. Foley raised a series of defenses in Fairfax to whit alleging the payment of the note by virtue of the financial transactions that developed we found out later on whether moneys were deposited and taken out and so forth by Silverstein and Zimdel.

Mr. Zimdel's deposition was taken and Mr. Foley's counsel brought this to the attention of the Court of Appeals. I didn't feel it was appropriate to bring in extraneous information not a part of this

record to the Court of Appeals, and for that reason, never raised the depositions of either Silverstein or Mr. Dunn (phonetic), who was the officer at the bank who handled these transactions, which substantially explained and contradicted what Mr. Zimdel thought were the circumstances.

That set of factual documentation has never hit the light of day. Now, that set of factual documentation would give credence to my statement to this Court that in fact, there was justification for the response by Mr. Green to me that he didn't feel there were any defenses to this action. However, because that information has never been presented to this Court, although I believe Mr. Green's counsel now attempted to do so in presenting transcripts to the Court, part of my justification for accepting his word that there were no defenses is not before the Court

nor can it be presented to the Court unless the Court revises those transcripts. It was not part of the Court of Appeal's record because it was in the Fairfax Circuit Court that those depositions were taken. They were not part of the record of this Court and cannot be presented according to my understanding of the rules to the Fourth Circuit Court of Appeals, so I didn't.

Now, I don't believe, Your Honor, that as counsel for Mr. Green through the process of this Court, that I have done anything improper that would require sanctions. I made a rational investigation of the claim. I received exhibits documenting the claim made by the client. I made inquiry as to what else there might be. And knew of nothing that the Court of Appeals relies upon until I presented it here to Mr. Hartnett or shortly before

that, that day when Your Honor was ruling on the motions for summary judgment.

Subsequent to that time he reviewed those documents and before the matter went up on the appeal filed subsequent motions before you saying that wait a minute, we have just found this out, and this could affect it.

Your Honor did deny his motions accordingly. I don't know what more I could have done nor what this Court would ask me to do than what I did do. I ask that any request for sanctions be dismissed.

THE COURT: Anything further?

MR. TOOTHMAN: Briefly in reply: Mr. Freedman has just addressed one of the primary points I was going to make, which is that its reasons -- much was made of the fact that there was an agreed designation for the purpose of the appeal of the record. Well, there is always an agreed

designation, but what has to go into the record is what was before this Court. They are the ones who submitted deposition transcripts by letter to the Fourth Circuit.

The irony here is that the facts, the depositions and so forth that they submitted a great deal of them were submitted through a rule 60(b) motion to this Court and then that record went up with the appeal of the summary judgment decision and denial of the reconsideration. So that's how they got their information into the record unopposed by us.

But now we are attempting to tell this Court the full story, and we are being told that that is an impropriety. That is the route they took before, Your Honor. This case has been, the trial of this case began with entry of summary judgment by the Court. That's when the

facts started coming out. That's when the argument about the facts began and a lot of legal theories developed because it used to be a simple case on a note. They had notice of the relationship between Green and the other two people. They knew that if they took discovery they would find out more. They just waited.

THE COURT: Yes, but it was your motion for summary judgment that shortcircuited the ordinary trial process.

MR. TOOTHMAN: There were cross motions, I believe, Your Honor. Also, Your Honor, we answered all their discovery early so it's not as though that by filing summary judgment motion in compliance with this Court's rulings that require filing of such motions before the cutoff of discovery we were somehow taking an underhanded attempt --

THE COURT: I don't suggest that.

MR. TOOTHMAN: I'm sorry, Your Honor.

Your Honor, if I may I would like to analyze certain parts of their request for sanctions because I believe they are particularly inappropriate: the suggestion that this Court could enter sanctions for proceedings or expenses of proceedings in the Fairfax case, another Circuit Court, a separate Court with its own sanction authority, is incorrect. This Court has no ability to sanction conduct before another Court. The question of their appropriateness or not is best left to that Court.

Similarly, the Court should not enter sanctions regarding behavior of the Court of Appeals. The Court of Appeals has the authority to do that, I believe. It's not the place of this Court through its Rule 11 to decide whether there should be sanctions entered for conduct or for time spent on an appeal. That's a matter that

should have been addressed to the Fourth Circuit.

As to why the case was filed in the State Court, it's my understanding, Your Honor, that that was because Foley sent the letter to Green demanding that he should have been sued in the State Court and there was some suggestion that he was the one who raised, and intended to rely upon the State statute of Virginia, which requires that should be brought against the partnership and other procedural matters relating to suits against partnerships. And that was an issue that I believe was precipitated by Mr. Foley's insistence upon that, insistence that they had not waived that right. So if there was a suit brought in State Court it wasn't necessarily because Mr. Green wanted to.

I am sure he would have preferred to

have one action resolving all these disputes with Mr. Foley rather than two or three or four as I believe there now are.

Your Honor, in analyzing the factors addressed by Mr. Hartnett, he suggested that there were three factors to be considered in entering Rule 11 sanctions. Two of them are really I believe the same. One is deterrence and one is punishment.

Mr. Green is a respected attorney. He has already been damned, punished, deterred by this conduct. He has been found by the Fourth Circuit in a published opinion to have been engaged in fraud. That's a fairly significant sanction for a man of his standing in the community. It's already ruined his career, Your Honor, especially if he never gets an opportunity to tell his side of the story. He will never be vindicated. And that is a very significant sanction in and of itself,

apart from Rule 11, the money.

Money is a small matter here. This isn't a question of a case being driven by desire to avoid $20,000 or $30,000 here or $60,000 there. This man's career is worth a lot more than that to him. His good name is worth a lot more than that to him and to the firm that bears his name. It's not a case driven by desire to avoid a few pennies here and there. It's a case driven by the fact that already he has been given one of the most severe sanctions that any attorney could ever be given, not to be put in jail.

Many attorneys would be pleased to serve time in jail if they were fighting for a cause. For instance, if they felt they were right and they were held in contempt they might be pleased to serve time in jail because they felt they were doing a professional duty but a jail term or a

sanction or a monetary penalty is not something an attorney really fears.

It's the sullying of his good name and that's already occurred here and occurred in a manner that is particularly nightmarish for an attorney because it occurred without any due process of law. It's the one thing that an attorney such as Mr. Green stands for, it's an attorney who fights for civil rights and constitutional rights every day. He believes in the Constitution and his right to tell his side of the story. He believes also in the following of the rules of the Courts so he said I will bide my time. I will follow the rules. I will not throw deposition transcripts from the State Court proceeding in an appellate Court record by letter. I won't do that. I will follow the rules.

And for his trouble, what he got was

his reputation already ruined and now having added insult to injury, the suggestion that he should pay for somebody else's attorney's fees.

All we have to justify these fees is a conclusory affidavit absolutely no-- it's the sort of documentation of fees that is given with tongue in check because it doesn't allow analysis. It is just simply pages and pages of conclusory statement but not analysis. We are supposed to be paying for word processing time, for endless conferences.

Your Honor, just looking at the total amount of fees that are being requested here, it's an awful lot of money to be spent on a case resolved on a cross motion and a case on a note. $60,000 in fees is an awful lot of money.

There was some suggestion that we are going to continue to take appeals and that

we are somehow being obstreperous and undermining the functions of the Court. We are following all the rules, Your Honor. Everyone who takes a certiori petition knows they have a very slim chance of having it granted no matter how wrong their case may have been. But in this situation, Mr. Green is simply trying to still in the end believe that the system is going to right its wrong and to find the true facts or at least not continue to punish him without his ever having had his day in Court to explain himself.

Your Honor, unless you have further questions, I have no further statement.

THE COURT: No.

MR. HARTNETT: Your Honor, may I respond just briefly?

THE COURT: Very briefly.

MR. HARTNETT: Your Honor, the Rule 11 just asks that Foley be reimbursed for

his legal fees which were all totally unnecessary here. You have just heard from counsel for Mr. Green that this thing has no prospects of ending. And that is why we would ask that we be permitted to supplement those fees up through whatever point in time Mr. Green sees fit to give up the ghost and take his medicine. I think that we can pretty much at this point project that there may be appeals of your ruling here today that go up to the Fourth Circuit and this thing might not be over for another year. I think that therefore, not only should Foley's motion for sanctions be granted, as to everything that he has asked for and those damages go through the end of October only, October of '88; we have got all of November and there was a lot that Mr. Green forced us to do in November.

I think we are going to see some

more. We would ask that until such time as Mr. Green ceases this charade, that Foley be awarded his legal fees pursuant to the Rule 11 motion. Thank you, Your Honor.

THE COURT: The purpose of a Rule 11 sanction is primarily punitive to defer future conduct such as the Court of Appeals has found occurred in this case. While it is to benefit the wronged party, to some extent, I don't view that as the primary role of a Rule 11 sanction. I think Rule 11 sanctions are in order, and I think the Court of Appeals' finding that the plaintiff consistently and materially misrepresented his status as a holder of the notes claimed that he was a bona fide purchaser of notes of value is a fact that I cannot reexamine. I don't think it's binding on the Court as far as whether to impose Rule 11 sanctions, but in the face

of it, it seems to me that absent some extraordinary circumstances that even accepting the proffers of the plaintiff's attorneys, I do not find to be present.

Certainly sanctions are in order. I will award sanctions, but I do not intend by them to fully compensate the defendant for his attorney's fees, because I think that to do so would unduly punish the plaintiff, who will already be and has already been punished.

So the figure I am going to award does not attempt to fully compensate the defendant for its attorney's fees, and therefore, I don't get into the question of whether those attorney's fees are reasonable. I don't suggest they are unreasonable. I don't mean that, but I don't make any determination, because the figure I am going to award is not going to full compensate the defendant for his attor-

ney's fees.

But it seems to me, given the punishment that the plaintiff has already undergone, that an award of $20,000, while admittedly not all of attorney's fees, that the defendant has incurred in this Court-- I would agree that the attorney's fees in the other Court are not an appropriate measure -- is in my view a sufficient sanction, to vindicate the objective sought to be vindicated by Rule 11.

More would unduly punish the plaintiff when considered in the context of what he has already undergone. Less would in my view minimize the seriousness of the conduct that the Court of Appeals has found and which I don't think I am able to reexamine. I see no need for any further evidentiary hearing. I am unwilling to grant any 60(b) motion for relief of the judgment of the Court of Appeals. I think

that further discovery in the case is unwarranted and therefore the Magistrate's order granting a protective order is appropriate, and obviously the plaintiff's motion himself for Rule 11 sanctions will be denied.

The request for fees, an award of fees as against both counsel and the plaintiff, I am unpersuaded that counsel for the plaintiff's conduct was sufficiently reprehensible or did not objectively show a reasonable investigation into the validity of the plaintiff's claim. So the imposition of the sanction will be against the plaintiff himself and not against counsel.

I will prepare the order.

MR. TOOTHMAN: Your Honor, may I move now at this time to stay execution of that sanction until we have had an opportunity to bring an appeal to the Fourth Circuit?

THE COURT: Well, upon the posting of a supersedeas bond, I don't think I have any choice in that matter. I would think a $25,000 supersedeas bond would be sufficient, provided it is -- how long do you want to post that bond?

MR. TOOTHMAN: I would have to check with my client, Your Honor. It's my understanding of these processes that they sometimes take -- may take several weeks.

THE COURT: I am not willing to wait several weeks. I will direct that it's to be posted if there is to be any delay of execution on it by midweek. And that's Wednesday.

MR. TOOTHMAN: All right.

MR. FREEDMAN: Your Honor, I understand that the sanctions are against Mr. Green individually but not against counsel?

THE COURT: Yes, sir.

MR. FREEDMAN: Thank you, Your Honor.

THE COURT: Court will stand adjourned.

(Whereupon, at 12:20 p.m., Court was adjourned.)

**APPENDIX P**

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
ALEXANDRIA DIVISION

GARY GREEN,

Plaintiff,

-vs-

CIVIL ACTION
NO. 87-350-A

MAURICE P. FOLEY,

Defendant.

O R D E R

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the plaintiff for sanctions pursuant to F. R. Civ. P. 11 is denied.

2. The motion of the plaintiff for reconsideration of the magistrate's order of November 18, 1988 is denied.

3. The motion of the plaintiff for relief from judgment is denied.

4. The motion of the plaintiff for an evidentiary hearing is denied.

an evidentiary hearing is denied.

5. The motion of the defendant for sanctions pursuant to F. R. Civ. P. 11 is granted, and there is imposed against the plaintiff, Gary Green, but not his counsel, a sanction in the amount of $20,000. Execution on this sanction is stayed on condition that the plaintiff on or before December 7, 1988, post a supersedeas bond in the amount of $25,000, conditioned according to law and secured by either cash or surety approved by the clerk.

/s/
United States District Judge

Alexandria, Virginia
December 2nd, 1988

**APPENDIX Q**

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
Alexandria Division

GARY GREEN,

Plaintiff,

-vs-

CIVIL ACTION
NO. 87-350-A

MAURICE P. FOLEY,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiff, Gary Green, hereby appeals the December 2, 1988, decision of the district court entering sanctions pursuant to Federal Rule of Civil Procedure 11 against plaintiff Gary Green personally. This appeal is taken from all decisions of all motions pending before the Court on December 2, including all motions ruled upon in the Court's December 2, 1988, Order.

On December 2, counsel for defendant Foley stated that any attempt to appeal

the decision of the Court would be met with a further sanctions motion against Mr. Green, his counsel, Mr. Toothman, individually, and Mr. Toothman's firm. For this reasons, plaintiff hereby takes the unusual step of stating its grounds for appeal of the December 2 decision of the district court. First, this appeal is based on the Court's failure to grant the motions filed by plaintiff Green and its failure to deny the motions filed by defendant Foley. The basis for our position on these questions is already set forth in the various memoranda, exhibits, and other materials filed with the district court. Second, this appeal is noticed because the time for filing a petition for certiorari seeking review of the decision of the Fourth Circuit, which led to these sanctions, has not yet expired and Mr. Green intends to file a petition for certiorari

before that time expires. It is our concern that, since the deadline for filing a Notice Of Appeal may be deemed to be jurisdictional, it is incumbent upon Mr. Green to notice this appeal of the sanctions in the event that the United States Supreme Court reverses the Fourth Circuit on the merits. Without noticing this appeal, our concern is that even a reversal of the Fourth Circuit would not guarantee a reversal of the sanctions entered separately by the district court.

Submitted with this Notice Of Appeal is a Supersedeas Bond in the amount of $25,000, as previously set by the Court on December 2. This matter should therefore be stayed pending review.

Respectfully submitted,

/s/GARY GREEN,
By Counsel

COUNSEL FOR PLAINTIFF:

/s/ John W. Toothman
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**APPENDIX R**

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
Alexandria Division

GARY GREEN,

Plaintiff,

-vs-

CIVIL ACTION
NO. 87-350-A

MAURICE P. FOLEY,

Defendant.

NOTICE OF CROSS APPEAL

Notice is hereby given that Maurice P. Foley, Defendant in the above entitled action, hereby cross appeals to the United States Court of Appeals for the Fourth Circuit the December 2, 1988 decision of the District Court to enter an Order imposing sanctions against Plaintiff Gary Green pursuant to Rule 11 of the Federal Rules of Civil Procedure. Foley cross appeals the amount of sanctions imposed by the District Court.

/s/John R. Hartnett
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Counsel for
Maurice P. Foley

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Cross Appeal was mailed, first class postage prepaid, this 14th day of December, 1988 to John W. Toothman, Esq., P.O. Box 1417-A44, 112 North Columbus Street, Alexandria, VA 22313.

/s/ John R. Hartnett

Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

Petitioner,

v.

MAURICE P. FOLEY,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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March 20, 1989

## *QUESTIONS PRESENTED FOR REVIEW*

Whether the Court of Appeals acted properly and within its discretion by directing that summary judgment be entered for Respondent based upon an uncontroverted record which supported that ruling.

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1988**

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**GARY GREEN,**

**Petitioner,**

**v.**

**MAURICE P. FOLEY,**

**Respondent.**

---

**BRIEF IN OPPOSITION TO PETITION FOR**

**A WRIT OF CERTIORARI**
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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The respondent, Maurice P. Foley, respectfully prays this Court deny the Petition for Writ of Certiorari of Gary Green.

## STATUTES AND RULES INVOLVED

1. 28 U.S.C. 2106: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

2. Rule 17.1 of the Rules of the Supreme Court of the United States: A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

3. Rule 10 (e) of the Federal Rules of Appellate Procedure: CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident

or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

4. I.O.P. 10.4 of the Rules of the Fourth Circuit Court of Appeals: SUPPLEMENTAL RECORDS, MODIFICATION OR CORRECTION. Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the Court of Appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the Court of Appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process.

5. Rule 60(b)(3) of the Federal Rules of Civil Procedure: RELIEF FROM JUDGMENT OR ORDER.

Mistakes; Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon subject terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

6. Va. Code Ann. § 8.3-603(1) (1950): The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with

knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not however, result in the discharge of the liability

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

(b) of a party (other than an intermediary bank or a payor bank which is not a depository bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

7. Va. Code Ann. § 50-25 (2)(a) (1950): A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

8. Va. Code Ann. § 50-73.42 (1950): Limitations on distribution. A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of their partnership assets.

9. Va. Code Ann. § 49-25 (1950): SURETY MAY REQUIRE CREDITOR TO SUE. -- The surety, guarantor or

endorser, or his committee or personal representative, of any person bound by any contract may, if a right of action has accrued thereon, require the creditor or his committee or personal representative, by notice in writing, to institute suit thereon, and if he be bound in a bond with a condition, or for the performance of some collateral undertaking, he shall also specify in such requirement the breach of the condition or undertaking for which he requires suit to be brought. Such written notice shall also notify the creditor, his committee or personal representative, that failure to act will result in the loss of the surety, guarantor or endorser, his committee or personal representative as security for the debt in accordance with § 49.26 of the Code of Virginia.

10. Va. Code Ann. § 49-26 (1950): EFFECT OF FAILURE OF CREDITOR TO SUE. If such creditor, or his committee or personal representative, shall not, within thirty days after such requirement, institute suit against every party to such contract who is resident in this State and not insolvent and prosecute the same with due diligence to judgment and by execution, he shall forfeit his right to demand of such surety, guarantor or endorser or his estate, and of his cosureties and their estates, the money due by any such contract for the payment of money, or the damages sustained by any breach of the collateral condition or undertaking specified as aforesaid; but the conditions, rights and remedies against the principal debtor shall remain unimpaired thereby.

## RESPONDENT'S SUPPLEMENTATION OF THE STATEMENT OF THE CASE

Respondent disagrees with Petitioner's presentation of the Statement of the Case in the following particulars:

1. Green's claim that the funds deposited into the partnership account "played no role in the purchase of the notes" is unsupported by the record. It is also contrary to the totality of testimony given at the Silverstein and Gunn depositions, which were not made a part of the record by Green. Green now improperly attempts to supplement the record by including in his Appendix misleading excerpts of those depositions. Green's claim that the cashier's check was obtained with funds debited directly from the personal accounts of Zimpel and Silverstein is only half true. See Petitioner's Appendix B at 14a.

The facts supported by the uncontroverted record below, as well as the Silverstein and Gunn depositions, demonstrate that Gunn, the bank officer, was entirely unaware that Zimpel and Silverstein had deposited the funds into the partnership account and then returned those same funds to their personal accounts prior to requesting that the personal accounts be debited in order to purchase the cashier's check. Silverstein's full account agrees with Zimpel's in all relevant particulars.

2. The Zimpel, Silverstein and Gunn depositions were all available to Green prior to oral argument in the Court of Appeals. Green never relied upon the Silverstein and Gunn depositions nor disputed the facts portrayed in the Zimpel deposition.[1]

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[1]As the Court of Appeals recognized, the laundering of the funds via the circuitous bank transactions had as its goal the concealment of the fact, also recognized in Green's own affidavit, that partnership funds had been created by the deposit into the partnership account. A discharge and extinguishment of the debt occurred under Virginia law since partnership funds had been used to acquire the partnership debt. See Petitioner's Appendix B at 8a.

3. The "Green letter," which detailed the conspiracy between Green and Foley's erstwhile partners, was produced on July 2, 1987 just before the hearing on summary judgment. The letter was accompanied by other production which counsel for Green described to the panel at oral argument as "voluminous."[2]

4. As recognized by the Court of Appeals, Foley acted with dispatch to verify the "Green letter." After his Motion to Vacate pursuant to Fed.R.Civ.P. 59(e) was denied, Foley undertook to depose Zimpel. It was the Zimpel deposition which brought to light the implementation of the "Green letter." See Petitioner's Appendix B at 7a. The circuitous bank transactions and the device of the cashier's check were used to conceal the fact that partnership funds had discharged the debt under Virginia law. See Petitioner's Appendix B at 8a and 25a. Immediately after the Zimpel deposition, Foley requested an extension of time from the Court of Appeals and filed his *Motion for Relief from Judgment* pursuant to Rule 60(b)(3).[3]

5. Green neglects to inform that Foley's counsel wrote to the Clerk of the Court of Appeals only after an improper ex parte letter was sent by Green's counsel directly to the appellate panel one day after oral argument. The letter of Green's counsel was a rehash of his arguments the day

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[2]Foley's discovery requests had been hand-delivered to Green's counsel on June 3, 1987. Green's production of the material was hardly "early," as he would have this Court believe. Indeed, Green's counsel admitted in the course of the Zimpel deposition that the "Green letter" was produced unwillingly, by mistake. See Petitioner's Appendix B at 17a.

[3]Green's opposition to Foley's 60(b)(3) Motion did not dispute but rather conceded the facts and the sequence of events borne out by Zimpel's deposition. Green argued to the District Court that the deposit into the partnership account was a "mistake" and that the funds never became partnership property. Green made the same argument, upon the same facts, to the Court of Appeals. He specifically did not argue that different funds were used and in fact, none were.

before. The portion of the Zimpel deposition transmitted by Foley consisted of a one page excerpt in which Green's counsel admitted that the pivotal "Green letter" had been produced by mistake. The excerpt contradicted a statement made by Green's counsel to the appellate panel at oral argument that the incriminating letter had been produced willingly. The one page excerpt played no role in the ruling of the Fourth Circuit and is mentioned only in a footnote to the opinion. See Petitioner's Appendix B at 17a, n.6.

6. Green neglects to inform that the dispositive material relied upon by the Court of Appeals was part of a Joint Appendix and Agreed Designation of the Record. The dispositive material came from the Zimpel deposition which was indeed part of the District Court record, having been submitted to that court in the course of Foley's 60(b)(3) Motion.[4]

7. It bears repeating that the depositions of Silverstein and Gunn were available to both parties at least one (1) month prior to oral argument and for the three (3) months thereafter while the parties awaited the ruling of the Fourth Circuit. Green was never precluded from using that "evidence." Indeed, Fed.R.App.P. 10 (e) expressly authorizes such supplementation of the record where necessary.

8. Green never wavered from the version of facts he conceded in the District Court (*after* Foley filed his 60 (b) (3) motion) and borne out by the material submitted by Foley. There is only one version of the facts. The Court of Appeals correctly applied the law of Virginia to those facts.

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[4]Fed.R.Civ.P. 60(b)(3) contemplates post-judgment submission of just such dispositive and fraudulently concealed information. There was no improper supplementation of the record, as Green suggests.

## REASONS FOR DENIAL OF THE WRIT

### SUMMARY OF ARGUMENT

I. The present case does not satisfy the threshold considerations, promulgated by this Court, for the granting of certiorari. Sup. Ct. R. 17. There is no conflict of opinion among the Circuit Courts of Appeal regarding Virginia commercial law or Virginia partnership law, the dispositive issues below. The principles involved are of importance solely to the parties, not to the public at large. Furthermore, Petitioner is improperly attempting to re-open and alter a closed record in order to avoid an adverse judgment which was clearly warranted by the facts and the applicable law of Virginia.

II. The actions of the Court of Appeals are wholly consistent with prior decisions of this Court.

## ARGUMENT

### I. THE PRESENT CASE DOES NOT SATISFY THE THRESHOLD REQUIREMENTS FOR GRANTING CERTIORARI.

This Court has historically held that certiorari is granted only:

> . . . in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. ed. 712, 714 (1923), cited with approval in *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. ed. 479, 482 (1951).

The Rules of the Supreme Court of the United States provide, in pertinent part, that certiorari is appropriate only where a federal court of appeals:

> . . . has so far departed from the accepted and usual course of judicial proceedings, . . . , to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

None of the above considerations is applicable here.

Since the present case involved questions peculiar to Virginia commercial and partnership law (e.g. the Virginia Notice Statute, Va. Code Ann. §§ 49-25, 49-26 (1950)) there can be no conflict among the circuits. In addition, there is no conflict or uncertainty on the question of the inherent power of the Court of Appeals to reverse the judgment of the District Court and remand with instructions to enter judgment. Such power is expressly authorized by statute. 28 U.S.C. § 2106. The instant case concerns no issues of public import. Rather, it is a dispute concerning payment of a promissory Note.

Petitioner is now bound by the record which was established both by him and by Respondent.

Contrary to Petitioner's assertions, there has been neither abuse of discretion nor improper conduct by the Court of Appeals. Green disingenuously alleges that the Court of Appeals "improperly supplemented" the record by accepting a "partial transcript" submitted by Respondent's counsel. In fact, Foley sent a letter to the Clerk of the Court of Appeals in response to Green's antecedant, ex parte correspondence to the members of the appellate panel after oral argument. The letter of Respondent's counsel included one page of a deposition transcript which contradicted assurances given by Petitioner's counsel to the panel at oral argument that the "Green letter" had been produced willingly.[5] There was no impropriety in Respondent's answer to Petitioner's ex parte communication to the panel or Respondent's documenting, in a one page attachment, Petitioner's misrepresentation made during oral argument. See Respondent's Appendix B. Such was the conclusion of the Court of Appeals. See Petitioner's Appendix B at 16a, note 6.

Green alleges that the Court of Appeals impermissibly determined facts, and drew inferences from those facts. Nothing could be further from the truth. The Court of Appeals, in reaching its decision, noted that it was presented with "a clear and uncontroverted record." See Petitioner's Appendix B at 31a. In fact, the Court was scrupulously careful to avoid ruling on matters where there was any factual uncertainty. See Petitioner's Appendix B at 15a n.5 and 33a.

Green directs this Court to his belated affidavit as authority for the meritless proposition that facts exist which might exonerate him. Respondent objects to the affidavit and

---

[5]The "Green letter" was the crucial document which revealed the conspiracy involving Petitioner and Respondent's two partners in Fairfax Associates (See Respondent's Appendix A).

hereby moves that it be stricken from the petition. Petitioner has failed to inform this Court that his affidavit was not filed in either court below on the merits prior to entry of judgment (the affidavit opposed Foley's successful motion for sanctions filed *after* the Fourth Circuit opinion on the merits). The affidavit is an untimely and misleading attempt to create factual issues where there were none. An agreed designation of the record (see Respondent's Appendix D) and an undisputed set of facts was submitted to the Court of Appeals.[6] Indeed, the applicable law of Virginia was argued on that basis. See Petitioner's Appendix B at 31a.

Green never varied from the account he presented to the District Court in his Response to Foley's 60 (b)(3) motion. In opposing Foley's *Motion for Relief from Judgment* in the trial Court, Petitioner argued:

> (Zimpel) took personal funds and deposited them in the partnership account but withdrew them the next day and purchased the cashier's check in Plaintiff's name . . . The deposit was a mistake which was corrected . . . when the funds were withdrawn. At the time the cashier (sic) check was purchased, the funds were Zimpel's and Silverstein's personal funds. See: Respondent's Appendix C.

Petitioner *never* disputed that Zimpel and Silverstein withdrew the funds from their personal accounts and deposited them in the Fairfax Associates Partnership Account.

---

[6]Both parties were in possession of the Silverstein deposition for approximately two (2) months prior to oral argument in the Court of Appeals and the Gunn deposition for one (1) month prior to oral argument. In addition, oral argument took place approximately three (3) months before the Court of Appeals entered its opinion. Had these depositions truly represented new "evidence," then was the time to *supplement* the record. Indeed, Petitioner made no mention of this "evidence" at oral argument or by ex-parte correspondence thereafter. Petitioner first presented his current version of the facts only after suffering a reversal at the appellate level.

Petitioner never disputed that the funds were next returned to the personal accounts of Zimpel and Silverstein and then used to purchase the cashier's check in Green's name. It is obvious that Petitioner Green had ample opportunity to present his present version of the facts, had they existed, to the Court of Appeals.[7]

Petitioner's protestations also ignore his right and duty to supplement the appellate record pursuant to Fed.R.App.P. 10 (e) and I.O.P. 10.4 (*Supra*). Although Petitioner's counsel took it upon himself to communicate ex parte with the appellate panel, he did not even mention this so called "evidence." Petitioner's absolute failure to correct or supplement when appropriate bespeaks desperation and the invalidity of this current "last ditch" effort to avoid judgment and opprobrium.[8]

In its opinion, the Court of Appeals ruled that Petitioner had failed to disclose that the funds used to purchase the promissory notes were partnership funds which, pursuant to Virginia law, gave Respondent the affirmative defense of payment. See Petitioner's Appendix B at 25a. The Court ruled

---

[7]The dispute in the Court of Appeals was legal not factual. Foley claimed, as a matter of Virginia law, that the deposited funds remained partnership funds. Green claimed that they never became partnership funds (his unconvincing "mistake" argument) or that they reverted to personal funds prior to the purchase of the cashier's check. The Court of Appeals disagreed. The *only* "factual" dispute turned on Green's claim that the funds were deposited into the partnership account by "mistake." The uncontroverted record gave the lie to that subterfuge. *See:* Petitioner's Appendix B at 27a–29a.

[8]Petitioner has failed utterly to distinguish his circumstance from that of any other party overturned on appeal. Petitioner has availed himself of every opportunity for reconsideration of the adverse ruling. After the Court of Appeals issued its opinion, Petitioner filed a *Petition for a Rehearing, Suggestion for Rehearing in Banc*, and *Motion to Supplement the Appellate Record*. All such requests were denied by the Court of Appeals. Subsequently, Petitioner filed, with the Court of Appeals, a *Motion to Stay Mandate*, which was similarly denied on October 17, 1988. Finally, Petitioner filed an *Application for Stay of the Mandate* with this Court which was denied by Chief Justice Rehnquist on October 25, 1988.

that Green had misrepresented the source of these funds. See Petitioner's Appendix B at 30a. Petitioner's conduct, according to the Court of Appeals, precluded Respondent Foley from presenting his meritorious defense of payment to the District Court in a timely fashion. *Ibid.* *All* rulings were properly based upon the uncontroverted record and the applicable law of Virginia. No ruling was the product of a choice between disputed facts.

Petitioner's argument that the Court of Appeals violated his constitutional right to be heard is preposterous. He was twice heard on the merits: by the District Court (where he opposed Foley's 60(b)(3) Motion and by the Court of Appeals (on brief and at oral argument). Ex parte, he attempted to reinforce oral argument by letter to the appellate panel. That he did not challenge the facts presented, in any proceeding, pleading or motion below, demonstrates his admission of them. His post-reversal attempts to revise the facts must be viewed as untimely and meretricious. Respondent therefore objects to all material contained in Petitioner's Appendices L-R as *not* part of the record on the merits below and moves to strike the material from the petition.

## II. THE ACTIONS OF THE COURT OF APPEALS ARE WHOLLY CONSISTENT WITH THE OPINIONS OF THIS COURT.

Petitioner claims that the actions of the Court of Appeals were improper and contrary to decisions of this Court. However, each case relied upon by Petitioner can be distinguished from the case at bar.

In *Fountain v. Filson*, 336 U.S. 681, 69 S. Ct. 754, 93 L. ed. 973 (1949), this Court reversed the judgment of a Court of Appeals which had reversed a summary judgment in the District Court for Petitioner Fountain and remanded with instructions to enter judgment for Respondent Filson. However, Fountain had not presented any evidence, facts, or law to the trial court. The action of the appellate court deprived Fountain of the opportunity to create a record. This Court held that the Court of Appeals entry of summary judgment (given a record bereft of Fountain's position, was error). 336 U.S. at 683, 69 S. Ct. at 754-755, 93 L. ed. at 913.

In the present case, Green never disputed Foley's version of the facts but rather adopted it in his arguments to the District Court and to the Court of Appeals. The adversarial process created an *uncontroverted* record. No disputed facts emerged until *after* Petitioner received an adverse ruling from the Court of Appeals.

Petitioner Green incorrectly claims that an appellate court cannot enter a judgment n.o.v. in favor of a party who was unsuccessful at trial. *Globe Liquor v. San Roman*, 332 U.S. 571, 68 S. Ct. 246, 92 L. ed. 179 (1948). However, in *Globe Liquor*, this Court held it improper for an appellate Court to enter judgment n.o.v. in favor of the losing party where that party had failed to move for judgment n.o.v. at trial. 332 U.S. at 574, 68 S. Ct. at 247, 92 L. ed. at 179. Clearly, the facts of *Globe Liquor* are inapposite to the case at bar, where summary judgment, not trial, determined the outcome in the lower

court. It cannot be doubted that an appellate court can direct that summary judgment be entered in such a situation as in the case at bar. 28 U.S.C. § 2106 (*Supra*). Furthermore, Foley had moved for summary relief in the District Court, thereby distinguishing the situation in *Globe Liquor*.

Equally inapposite is Petitioner's reliance upon *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. ed. 2d 953 (1958). In *Byrd*, the Court of Appeals disagreed with the District Court's construction of a state statute. As a result, the Appeals Court reversed the judgment of the District Court, and directed a judgment for respondent. 356 U.S. at 530, 78 S. Ct. at 897, 2 L. ed. 2d at 958. This Court reversed, holding that petitioner was entitled to try the issues involved under the Court of Appeals' new statutory interpretation. 356 U.S. at 532, 78 S. Ct. at 898, 2 L. ed. 2d at 959.

In the case at bar, however, Green availed himself of the opportunity to refute Foley's claim. Petitioner argued the *law* of Virginia on the subject of payment and discharge. See Petitioner's Appendix B at 26a–27a. Although the Court of Appeals was unpersuaded, it did not overturn any statutory interpretation of prevailing law as in *Byrd*. On the contrary, the uncontroverted record and prevailing Virginia law properly led the Court of Appeals to reverse the ruling of the District Court. *Ibid*. Such action is unquestionably within the purview of appellate authority. Petitioner was confronted with no surprises on appeal and had every opportunity, by way of brief and oral argument, to refute or rebut Respondent's view of the case.

Green has also directed this Court's attention to *Florida Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L. ed. 2d 248 (1963). In *Paul*, both parties were uncertain over the state of the record. Appellants argued that certain depositions and exhibits were admitted by the District Court while appellees assumed the opposite was true. 373 U.S. at

155, 83 S. Ct. at 1224, 10 L. ed. 2d at 264. Indeed, this Court was unable to determine whether or not the materials in question were admitted into evidence by the trial Court. *Ibid.* Clearly, such confusion about the record is distinguishable from the case at bar. No confusion regarding the state of the record ever existed at the appellate level or in the District Court. The Court of Appeals was presented with a "clear and uncontroverted record." See Petitioner's Appendix B at 31a. It did not base its decision on any matter which was not properly a part of that record. Therefore, Petitioner's reliance on *Paul* is also misplaced.

Finally, Petitioner argues that federal appellate courts cannot consider an issue which was not decided by the trial Court. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2 826 (1976). The validity of that principle cannot be doubted. However, such conduct did not occur in the case at bar. The Fourth Circuit decided and ruled upon only those issues which had been decided by the trial court and which were part of the record. It granted Foley the relief that he had expressly requested in his brief.

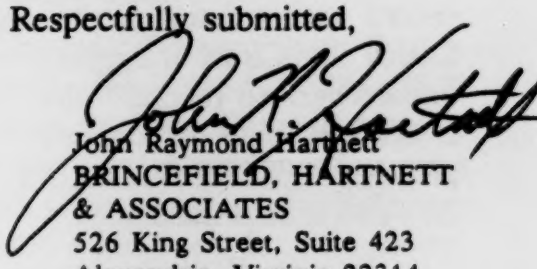
*Singleton* also stands for the inapposite proposition that a Court of Appeals should not consider the merits of a case where the only issue properly before it is a *Motion to Dismiss*. 428 U.S. at 119–120, 96 S. Ct. at 2876–2877, 49 L. Ed. 2d at 836. In *Singleton*, no answer or other responsive pleading addressed to the merits had been filed. The substantive issues had been neither raised nor pleaded prior to the District Court's Order granting the *Motion to Dismiss*. *Singleton* has no application to the case at bar since Foley had filed his *Answer* many months before and the case had long been "at issue" when the motions for summary judgment and relief from judgment reached the Fourth Circuit.

Not one authority cited by Petitioner supports his position. Each "authority" is factually distinguishable, legally inapposite, or both.

## CONCLUSION

The Court of Appeals acted properly and within its discretion in the case at bar. There is no basis to support the instant Petition. The Petition should be denied.

Respectfully submitted,



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Counsel of Record

*CERTIFICATE OF SERVICE*

The undersigned hereby certifies that he has this day served three copies of the foregoing Brief in opposition to Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals upon the person indicated below by depositing copies of same in the United States mail, first class postage prepaid, addressed as follows:

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**GRAD, TOOTHMAN, LOGAN & CHABOT, P.C.**
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(202) 7375046
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This the 20th day of March, 1989.

John R. Hartnett
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FILED
MAR 20
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

Petitioner,

v.

MAURICE P. FOLEY,

Respondent.

# APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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March 20, 1989

38 pp

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December 14, 1984

Mr. Alan M. Silverstein
Mr. Stephen M. Zimpel
7297 Lee Highway
Falls Church, VA 22042

Re: Silverstein and Zimpel

Dear Alan and Stephen:

I represented the two of you in connection with your acquisition of an interest in DEG. When I met with you in April, we agreed that in addition to my hourly rate, which DEG was to pay, if the deal was consumated [sic], the two of you would pay me or my firm a fee of $10,000.00 for acting as a finder and for collateral services.

On November 28, 1984 I met with you again at your office. During our discussion I raised the question of the $10,000.00, which still had not been paid. You both acknowledged the debt and offered

my an alternative payment based on negotiable notes and guarantees signed by a general partner (Foley) in one of your real estate deals. You offered to buy the notes and guaratees from the banks in my name in order to free up your lines of credit on the one hand, and to pay your debt to me on the other. Subject to your completion of all of the conditions set forth below, I agree to accept the alternative payment.

The conditions are as follows:

1. You will purchase in or have assigned to my name (or the name of my law firm) notes and guarantees signed by Foley (and his wife) from certain banks, including Mount Vernon Savings and Loan as well as Sovran Bank.

2. The notes and guarantees will have a purchase price and a net amount due in a sum in excess of $275,000.

3. The notes and guarantees will not be marked cancelled.

4. The costs of acquiring the notes and guarantees and of enforcing them (unless I elect to assume the costs of enforcement) will be paid by you.

5. Anything that is collected on the notes and guarantees will belong to me (or my firm if I so elect).

6. You have represented to me that the notes and guarantees are valid but that you believe Foley may not have sufficient assets to pay same; therefore, you do not guarantee collection, and that is a risk I will assume.

7. You also represented that Foley had breached his agreements with you and that you have set offs and counter-claims against him. I advised you that you will not be given credit for the payments made to acquire the notes and guarantees

because I will be the legal purchaser. You stated that you would assume the risk of any lawsuit by Foley for contribution and that whatever I recovered from Foley (and/or his wife) would not be subject to a reduction or payment by me to you for any sum Foley might be awarded from a cross claim, lawsuit or other action against you. In other words, I will retain whatever I recover from Foley without regard to what occurs between you and Foley.

8. If you are unable to acquire the notes and guarantees mentioned above by April 1, 1985, or if you do not satisfy the conditions, I will have the option of terminating this agreement, in which event, the said $10,000.00 fee will be paid by you.

If there is anything in this letter which does not accurately describe our agreement, please advise me promptly.

I am greatful for the opportunity you have offered in this innovative fee payment agreement.

Sincerely,

/s/ Gary Green

GARY GREEN

52000003.ltr

July 15, 1988

Clerk of the Court
United States Court of Appeals
For the Fourth Circuit
United States Court House
Tenth & Main Street
Richmond, Virginia 23219

Re: 87-2639 Green v. Foley
87-2685 Green v. Foley
Argued July 5, 1988

Dear Sir or Madam:

This responds to a copy of a letter I received three days ago, dated July 6, 1988, which was dispatched after oral argument to Judges Winter, Murnaghan and Sprouse (the members of the panel in the above-referenced appeals) by counsel for appellee Green. I represent the appellant, Maurice Foley.

After reviewing the content of that letter to the panel from opposing counsel, I recognized that it represented an ex parte communication to the Judges,

which appeared to me to be a procedure neither provided for by the Rules nor familiar to me as a matter of local practice. Uncertain how (or even whether to respond to the inaccuracies and argument contained in the letter, I contacted the case manager of the file in Richmond. He suggested that I send this letter response to you.

Please forward it (I have enclosed three copies) to Judges Winter, Murnaghan and Sprouse so that they will have it in addition to the letter already dispatched to them by my opponent in the event that they are inclined to consider the letters as part of the appeal.

By way of response to the July 6th letter, it will be remembered that Judge Winter cogently identified the gravamen

of Foley's appeal, namely, the material misrepresentations made by Green in his pleadings and motions relative to the manner in which he acquired the note and guaranty agreement.

Judge Winter specifically asked that I relate those misrepresentations to the use of the partnership account and the cashier's check which resulted in the payment and discharge of the debt by the partnership. Judges Sprouse and Murnaghan followed up with pertinent questions and comments regarding the impact of Green's misrepresentations upon Foley's ability to advance the meritorious defense of payment.

The issue was not, nor has it ever been, dilatory discovery but rather the affirmative misrepresentations contained

in Green's pleading and motions. Counsel for Mr. Green has not engaged that central issue either at oral argument or in his recent letter to the Court.

As the Court noted at oral argument (and as counsel for Green acknowledged), the Green letter to his co-conspirators Zimpel and Silverstein was handed to Foley's counsel immediately prior to the argument on the motion for summary judgment. That its production ultimately led to the uncovering of the carefully planned conspiracy misses the point that Green's numerous misrepresentations in his pleadings and motions (which, as the Court also noted, included Green's false affidavit that he had purchased the note and guaranty for full value) prevented Foley from advancing the defense of payment, which is dispositive of the

Green claim. Even if Foley had engaged in no discovery, the material misrepresentations of Green would have tainted the summary judgment and entitled Foley to the granting of his 60(b)(3) motion as established by the test adopted by this circuit in Square Const. Co. vs. Washington, et al. 657 F.2d 68 (4th Cir. 1981). Green's unabashed position seems to be that Foley should be penalized for not uncovering Green's fraud sooner. The irony is more shocking than amusing.

The recent letter by Mr. Green's counsel states that I claimed to have been "sandbagged" by untimely responses to discovery. Such was not my argument to the panel. My argument focused on the dipositive and uncontroverted defense of payment by the partnership and Green's

misrepresentations which have led us down this long road.

In point of fact, production of the vitally important Green letter, which put Foley's counsel on the trail of the conspiracy, was not even the result of a good faith effort by Green to comply with discovery. To the contrary, counsel for Green has acknowledged that he "let the cat out of the bag" quite unintentionally (see page 29 lines 10 thru 15 of the Zimpel deposition transcript attached).

This response is written, (with a superfluity of caution, perhaps) to ensure that there will be no sandbagging

of any one, by misdirection or otherwise.

Respectfully submitted,

John R. Hartnett

cc: Lawrence E. Freedman

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - x

GARY GREEN, :

Plaintiff, :

: At Law No.

vs. : 76682

STEPHEN M. ZIMPEL, et al.:

Defendants. :

- - - - - - - - - - - - - x

Alexandria, Virginia

Tuesday, October 6, 1987

Deposition of STEPHEN M. ZIMPEL, defendant, called examination by counsel for Maurice P. Foley, pursuant to notice, at the offices of Brincefield & Associates, 526 King Street, Suite 423, Alexandria, Virginia 22314, before Rebekah J. Johnson, a notary public in and for the

Commonwealth of Virginia, beginning at 11:20 a.m., when were present on behalf of the respective parties:

FOR THE PLAINTIFF:

LAWRENCE E. FREEDMAN, ESQ., 10560 Main Street, Penthouse Nine, Fairfax, Virginia 22030.

FOR THE DEFENDANT ZIMPEL:

LYNN A. BRENNER, ESQ., 10521 Judicial Drive, Suite 305, Fairfax, Virginia 22030.

FOR MAURICE P. FOLEY:

JOHN R. HARTNETT, ESQ, Brincefield & Associates, 526 King Street, Suite 423, Alexandria, Virginia 22314.



my opinion that's why in another lawsuit Mr. Green produced this because he did not regard it as privileged.

MR. FREEDMAN: Well, now your assumption is totally inaccurate in that

particular instance. On behalf of Mr. Green we would extend the information that the communications existing and in leading up to this particular action did involve legal advice and as such if Mr. Zimpel chooses to raise the privilege it's his choice, but it does exist.

Secondly, the reason that the letter was produced was not as a result of privilege. I'll tell you frankly that the reason the letter was produced was because I in error allowed it to be produced, and having let the cat out of the bag it was gone and there was nothing else I could do about it. I've had to live with it ever since. But this may have been nothing more than a memorialization of an arrangement between them as it related to fees being owed. I consider fees being owed to me as attorney as much a part of the privilege

of a client as anything else, at least the basis and the foundation of those fees are, in any event.

MR HARTNETT: I'm not asking for the basis or the foundation of the fees. What I am asking about is the

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GARY GREEN, :
:
Plaintiff, :
:
vs. :
:
MAURICE P. FOLEY, :
:
Defendant. :

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

A. Statement of Facts

After the submission of Briefs and upon oral argument, Plaintiff's Motion for Summary Judgment was granted on July 22, 1987 as to Count I of Plaintiff's Complaint. On the date of argument, Defendant's counsel was provided with Plaintiff's Response to Defendant's Request for Production of Documents wherein Plaintiff produced the letter of Plaintiff to Mr. Alan Silverstein and Mr. Stephen M. Zimpel dated December 14, 1984

(hereinafter referred to as "Fee Agreement Letter"). A copy of the letter is attached hereto as Exhibit "A".

In the Fee Agreement Letter, Plaintiff confirmed his agreement with Silverstein and Zimpel that they would purchase from the banks notes and guarantees signed by Defendant in exchange for forgiveness of a debt owed to Plaintiff in the amount of $10,000.00. In his Motion for Reconsideration, Defendant referred to this letter at p. 4 of his Brief and attached it as Exhibit "D". That Motion for Reconsideration was denied on July 29, 1987.

Defendant now claims that he learned "for the first time, that the promissory note and guaranty agreement... were not purchased form the payee bank by Green". Legally and factually, Defendant's argument is without merit. Zimpel and

Silverstein did not purchase the notes; Plaintiff did. The transaction was accomplished when Zimpel and Silverstein bought a cashier check from Sovran Bank in Plaintiff's name. That check was then used by Green to buy the notes from Sovran Bank. In the Fee Agreement Letter, Plaintiff specifically stated that the notes would be purchased by Silverstein and Zimpel in Plaintiff's name. This was exactly what occurred. Defendant agrees that the cashier check was purchased in Plaintiff's name and for Plaintiff's benefit. Thus there is no dispute about the essential issue. Furthermore, because Defendant had the Fee Agreement Letter and argued from the letter in his Motion for Reconsideration, it is not new evidence as Defendant now claims.

Secondly, Defendant argues that, based on the deposition of Zimpel, the

notes were paid off with funds out of the account of Fairfax Associates, Ltd. This is a misrepresentation of Zimpel's testimony. Zimpel testified that he took personal funds and deposited them in the partnership account, but withdrew them the next day and purchased the cashier's check in Plaintiff's name. (Zimpel deposition, p. 11-12). Neither Zimpel nor Silverstein had any obligation to put funds in the partnership account and the deposit was a mistake which was corrected the next day when the funds were withdrawn. At the time the cashier check was purchased, the funds were Zimpel's and Silverstein's personal funds which were transferred to Plaintiff when the cashier check was purchased in accordance with the terms of the Fee Agreement Letter. Zimpel's deposition gave Defendant no new evidence, but

merely concurred with the content of the Fee Agreement Letter which Defendant already had in his possession.

B. Argument

1. The Debt Was Not Satisfied and The Principal Debtor, Fairfax Associates, Did Not Pay Off The Debt

Zimpel's deposition establishes that Sovran Bank was paid by Plaintiff who was the beneficiary of a cashier check bought with the personal funds of Zimpel and Silverstein. This transaction was carried out strictly in accordance with the Fee Agreement Letter. Therefore, partnership funds were not used to pay the debt. More importantly, the obligation on the note was not extinguished and the instrument was not cancelled. In his brief, Defendant argues that the case of Bank v. Lay, 80 Va. 436, 44 (1885), is controlling in this action. On the

contrary, it is easily distinguished. In Bank, supra, the debtor intended to pay off the debt and did so in his own name. By contrast, Zimpel never intended to and never did pay off the debt. Instead, his debt (as well as the debt of Defendant and the partnership) was merely transferred to Plaintiff. The debt is still extant and Plaintiff is suing all parties to collect it. Plaintiff made the payment to Sovran Bank with Plaintiff's cashier check; Zimpel did not pay Sovran nor did any of the other obligers. It is hornbook law that the intention of the party who is making the payment is controlloing. Union Trust Corp. v. Fugate, 172, Va. 82 (1939). As a stranger to the debt, Plaintiff is deemed to be a purchaser rather than a payor. It is only when the debt is intentionally paid by a party to the obligation that the debt is

discharged. Aetna Casualty & Surety Co. v. Whaley, 173 Va. 11 (1939).

2. Green Engaged In No Misconduct, Nor Did He Make Any Misrepresentations To This Court Which Would Justify Relief From Judgment Due To Misconduct Or Newly Discovered Evidence.

At all times, Green accurately represented to this Court and to Defendant that he had purchased the note by cashier's check in his name (See Exhibit B). The funds with which the notes were purchased were acquired by Green according to the terms of the Fee Agreement Letter. The notes were purchased by Green for value from the two banks holding the notes in exchange for which Zimpel was released from a debt of attorney's fees owed to Green.

If Foley was prevented from advancing his "meritorious defense of payment", as alleged in Defendant's brief, it was

by Defendant's counsel's misinterpretation of, or failure to read, the Fee Agreement Letter and, most recently, Defendant misstatement of Zimpel's testimony.

In order to prevail on a Motion for Relief from Judgment, the "newly discovered evidence" must be such that it was not and could not have been discovered in time to raise in the original proceedings. United States v. Williams, 674 F.2d 310 (4th Cir. 1982). As noted above, Defendant had the Fee Agreement Letter at the time that Plaintiff's Motion for Summary Judgment was heard and Defendant raised it in his Motion for Reconsideration. In addition, Defendant simply failed to take Zimpel's deposition in a timely fashion. What Defendant now claims is "new discovered evidence" is actually evidence that he both had

discovered, and, as to Zimpel, could have discovered, in time to raise in the original proceeding. Most significant is the fact that nothing Zimpel said is inconsistent with the Fee Agreement Letter. Indeed, Zimpel merely confirmed that the Fee Agreement Letter was implemented strictly according to its terms. This is hardly "newly discovered" evidence. Defendant's Motion must therefore be denied.

3. Defendant's Counsel's Failure to Discover the Evidence, or to Interpret it Properly, is not Grounds for Relief from Judgment

Defendant is not entitled to relief under Federal Rule of Civil Procedure 60(b). As established above, Defendant's counsel had before him the Fee Agreement Letter and argued from it before Summary Judgment was confirmed. The deposition of Stephen Zimpel demonstrated only that

Plaintiff and Zimpel lived up to the transaction contemplated by that letter. The transaction did not result in the extinguishment of the debt. Plaintiff was not a party to the underlying transactions, and he clearly purchased the notes for value. Defendant's attorney now seeks to add a new "spin" to the very transaction he relied on previously. An attorney's failure to conduct a more thorough review of the case or to make every argument available does not constitute excusable neglect under Rule 60(b). In Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir. 1983), cert. den. (1983) 78 Led. 2d. 103, the Court stated at p. 695:

> With regard to the "excusable neglect" contention, a leading commentator has pointed out:
>
> [A] party cannot have relief under Rule 60(b)(1) merely

> because he is unhappy with the judgment. Instead he must make some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law...
>
> 11 Wright and Miller, Federal Practice and Procedure, Sec. 2858 at p. 170.

As in Chick Kam Choo, supra, Defendant's attorney's original view of the case was not the result of being denied the true facts but was the result solely of his original litigation strategy and analysis. Counsel's failure to argue his new version of the significance of the Fee Agreement Letter does not support Defendant's F.R.C.P. 60(b) Motion.

4. This Court has no Jurisdiction to Hear Defendant's Motion for Relief

Defendant filed an Appeal in the United States Court of Appeals for the Fourth Circuit on August 18, 1987. Once

an appeal has been taken, the District Court is divested of jurisdiction unless the Court of Appeals remands the case. Miller v. United States, 114 F.2d 267 (7th Cir. 1940). The District Court is without the power to grant relief under rule 60(b) except with permission of the Appellate Court which permission has not been granted in this case. Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985).

As Defendant has already filed his Appeal, and the Court of Appeals has not remanded the case for this Court's consideration, the Defendant's Motion must be dismissed for lack of jurisdiction.

C. Conclusion

For all of the arguments set forth above, Defendant's Motion for Relief must be Denied.

Respectfully Submitted,

LAWRENCE FREEDMAN, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | | |
|---|---|---|
| GARY GREEN | ) | |
| | ) | |
| Appellee | ) | |
| | ) | |
| vs. | ) | Docket No. 87-2639 |
| | ) | |
| MAURICE P. FOLEY | ) | |
| | ) | |
| Appellant | ) | |

AGREED DESIGNATION OF RECORD

DESIGNATIONS FROM RECORD ON MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO F.R.C.P. 60(b)(3) 10/30/87

2. NOTICE returnable 10-23-87 together with MOTION for relief from judgment; BRIEF in support of same - filed by deft. cc

3. RESPONSE to deft's motion for relief from judgment - filed by pltf. cc

4. ORDERED that the motion of deft. for relief from judgment entered in this action on 7-22-87 and 7-31-87 is denied - entered and filed (AVB). Copies sent. sp

5. NOTICE of Appeal of order of 10-30-87 - filed by Det. Foley. jgs

-- TRANSCRIPT of Proceedings before Judge Bryan on 10-30-87 - filed. jgs

DESIGNATION FROM RECORED OF U.S.D.C. FOR THE DISTRICT OF MARYLAND (TRANSFERRED TO EASTERN DISTRICT OF VIRGINIA)

1. COMPLAINT.

5. ANSWER of Defendant M. FOLEY (c/s)

16. ORDER (Hargrove, J.) dated 3/5/87, "GRANTING" Motion of Defendant for Change of Venue and transferring case to the United States District Court for the Eastern District of Virginia. (c/m 3/5/87 bma) (EOD 3/6/87 gez)

DESIGNATIONS FROM RECORDED ON SUMMARY JUDGMENT AND MOTION TO VACATE 7/22/87 AND 7/31/87

3. REQUEST for Admissions - filed by Deft. jgs.

4. FIRST set of Interrogatories filed by Deft. jgs.

5. NOTICE returnable 6-26-87 together with MOTION FOR SUMMARY JUDGMENT: AFFIDAVIT of pltf. in support therof - filed by pltf. cc

7. NOTICE returnable 6-26-87 together with MOTION FOR SUMMARY JUDGMENT: BRIEF in support of same - filed by deft Maurice Foley.

9. AFFIDAVIT in Support of Motion for SJ - filed by David L. Gunn. jgs.

10. AFFIDAVIT in Support of Motion for SJ - filed by A.J. Starinieri. jgs.

15. OPPOSITION to pltf's motion for summary judgment - filed by deft. cc

16. BRIEF in opposition to pltf's motion for sumary judgment - filed by deft. cc

17. RESPONSE to motion for summary judgment - filed by pltf. jn

-- TRIAL PROCEEDINGS: Judge Bryan. Reporter: McCoy. This matter came on

for hearing on cross motions for summary judgment. Counsel appeared. Motions argued and summary judgment granted in favor of pltf. in part and in favor of deft. in part. Counsel to submit original promissory notes to Court for preparation of order. sp

18. ORDERED that the motion of pltf. for summary judgment on 1-28-83 Guaranty of deft. Maurice Foley in the amount of $221,500.00 is granted and judgment is entered in favor of Green against Maurice Foley in the amount of $221,500.00 plus costs and attys.' fees; motion of pltf. for summary judgment on 8-2-82 Guaranty Agreement is denied; motion of deft. M. Foley for summary judgment is denied however pltf.'s claim for judgment in amount of $38.244.45

contained in complaint is dismissed w/o prej. to pltf.'s right to pursue collections of that amount in Circuit Court of Fx. Co., VA - entered and filed(AVB). Copies sent. sp

19. NOTICE returnable 7-31-87 together with MOTION to vacate summary judgment and grant rehearing and reconsideration;- BRIEF In support of same - filed by deft. cc

20. ORDER that the Motion to vacate SJ is denied (AVB) - ent & filed c/m jgs.

21. NOTICE of Appeal of order of 7-22-87 & 7-31-87 - filed by Deft. jgs.

-- TRANSCRIPT of Motion for SJ before Judge Bryan 7-2-87 - filed jgs

RESPECTFULLY SUBMITTED,

BRINCEFIELD & ASSOCIATES, P.C.

John R. Hartnett
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Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's and Appellee's Agreed Designation of Record was mailed, first class, postage prepied this 10th day of December, 1987 to Lawrence E. Freedman, 10560 Main Street, Ph. 9, Fairfax, VA 22030, Counsel for Appellee.

John R. Hartnett

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

---

RECORD NO. 87-2639 (L)

---

GARY GREEN,
Appellee,

v.

MAURICE P. FOLEY,
Appellant.

---

# JOINT APPENDIX

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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Supreme Court, U.S.
FILED
MAR 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Gary Green,

Petitioner,

v.

Maurice P. Foley,

Respondent.

# PETITIONER'S REPLY BRIEF

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March 28, 1989

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No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Gary Green,

Petitioner,

v.

Maurice P. Foley,

Respondent.

# PETITIONER'S REPLY BRIEF

## DISCUSSION

### THE FOURTH CIRCUIT'S DECISION WARRANTS REVIEW BECAUSE IT IS CONTRARY TO THIS COURT'S RULINGS AND SERIOUSLY UNDERMINES THE EFFICACY OF THE SUMMARY JUDGMENT PROCEDURE

The Fourth Circuit deprived Petitioner, Gary Green, of his right to a hearing on the merits of his complaint by resolving against him factual issues never litigated at the trial court level and raised for the first time after summary

judgment had been granted in his favor.

Petitioner's complaint sought to enforce two agreements by which Respondent Foley guaranteed loans made to a partnership in which Foley was a principal. The district court dismissed the complaint with regard to one note (the Mount Vernon note), however, it granted Green summary judgment under Federal Rule of Civil Procedure 56 on the other note (the Sovran note).

Thereafter, Foley filed a Motion to Vacate Summary Judgment and Grant Rehearing and Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Foley argued, inter alia, that a document he obtained through discovery on the day of the court's hearing[1] of the

---

[1] Despite the fact that this document was produced four days before the response date provided by the Federal Rule of Civil Procedure 34, Respondent complains that the document was not

summary judgment motion created a material issue of fact as to Green's status as a purchaser of the notes. The district court denied Foley's motion two days later, without a hearing.

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produced early enough, and that its production was the result of a mistake. Br. in Opp. at 8, n.2. Green's attorney at the time did, indeed, say: "the reason the letter was produced was because I in error allowed it to be produced . . . ." Ap. 17a (emphasis added). This statement has been used by both the Respondent and the Fourth Circuit to support the conclusion that "Green had no intention of disclosing the true manner in which he obtained the notes. . . ." App. 17a. There is, however, absolutely no direct evidence in the Record before the court of appeals to establish Green's intent; Green never testified and he was not deposed. Contrary to Respondent's argument, a conclusion regarding the intent of a party is a classic issue of fact; and the court of appeals clearly relied upon its determination in this regard to support its conclusion that Green's claim was fraudulent. The Fourth Circuit's treatment of this issue vividly illustrates the extent to which it strayed from the principles enunciated by this Court in such cases as Adickes v. S.H. Kress & Co., 388 U.S. 144 (1970), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

While the case was pending on appeal, Foley filed a second post-judgment motion pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. Foley argued that subsequent deposition testimony in the state court proceeding on the Mount Vernon note proved that the Sovran note had been discharged pursuant to Va. Code Ann. Sec. 8.3-803. The district court denied this motion as well.

On Foley's consolidated appeals, the Fourth Circuit reversed the district court, but rather than remanding the case for further proceedings, it directed that summary judgment be granted against Foley on the ground that the note had been discharged. The decision of the Fourth Circuit rested on its factual determination that partnership funds had been used to acquire the notes on Green's behalf, a subject on which Green had never been

heard. In so doing, the Fourth Circuit transformed the case into an "appellate trial" in which the only evidence was that offered by Foley in support of his two post-judgment motions.[2] Until that time, however, the issue was never whether summary judgment would be entered for Foley, but whether Green's judgment would be re-

---

[2] Foley's case rested on excerpts of a deposition transcript from another proceeding. Petitioner has here provided the Court, as Appendices L through R, with all of the countervailing evidence presently available as a result of parallel proceedings involving these same parties. Respondent has characterized these materials as "misleading." Br. in Opp. at 7, 13. It is beyond comprehension that these materials can be any more "misleading" in a substantive sense than were the partial transcripts submitted to the court of appeals by Foley himself. It is for a trial court to ascertain the facts, including which facts are "misleading." Moreover, contrary to the assertion of the Respondent, Petitioner specifically noted that these portions of the Appendix were not part of the Record below and specifically requested leave to supplement the Record, Petition at 17, n.14.

opened.

Respondent emphasizes that the Record before the court of appeals was "uncontroverted."[3] The case, however, had proceeded only so far as Green's motion for summary judgment; Green was under no obligation to put on his entire case. Indeed, Rule 56 only obliged him to present legal arguments and uncontested facts. Green had neither cause nor opportunity to con-

---

[3] The Joint Appendix, however, is not a stipulation that all of the material contained therein was true and "uncontroverted." The parties to any appeal are admonished to cooperate in constructing an appendix, but that does not mean that one party, by cooperating in the designation of an appendix, thereby admits as true the statements in the documents. The fact that Green's prior counsel was obliged to argue on the Record as it existed does not mean that Green conceded that the post-judgment evidence submitted by Foley was uncontroverted. Foley's reliance on Rule 10(e) and Fourth Circuit I.O.P. 10.4 are irrelevant -- all those rules do is perfect a record with existing information that <u>should</u> originally <u>have</u> been in the record; they are not a means by which to try new issues on appeal.

trovert the evidence (submitted by Foley in support of his two post-judgment motions) upon which the Fourth Circuit based its decision -- on both post-judgment motions he prevailed. The issue before the district court was whether Foley had alleged any facts which were sufficient to warrant re-opening the case. By ruling that the evidence offered by Foley did not warrant relief pursuant to either Rule 59 or 60, the district court closed the record without any evidence being presented by Green. But rather than remand the case for further proceedings, the court of appeals then acted without giving Green a chance to tell his side.

This court has recognized and forbidden this kind of procedure in a series of cases beginning with Fountain v. Filson, 336 U.S. 681 (1940). Respondent attempts to distinguish Fountain and its

progeny; however, the discussion merely points out a distinction without a difference. Fountain and the cases which follow from it stand for the principle that a party cannot be deprived of the right to a trial to meet an alleged defect in its case identified for the first time by a court of appeals. The circumstances in which that issue arises here differ in no material way from those which have gone before, and the principle is the same. In all federal courts "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law." 10A C. Wright, A Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2720, at 34 (1983). Contrary to the assertions of Respondent, this case has significance

far beyond the parties to this case. If allowed to stand, the decision of the Fourth Circuit will undermine the efficacy of Rule 56.[4] Parties will either be discouraged from utilizing the summary judgment procedure or encouraged to buttress their motion with such extensive factual support on all issues, including those counsel knows are controverted, that the utility of the procedure will be lost.

Nor is the decision of the Fourth Circuit an isolated event. It is becoming increasingly apparent that in the forty years since Fountain federal courts have drifted from its teachings. In the last two years alone, this Court has been presented with at least three other petitions for certiorari involving this

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[4] The importance of Rule 56 in this scope of judicial administration has recently been reiterated by this Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

same issue.[5]

**CONCLUSION**

For the reasons set forth above, Petitioner prays that a writ of certiorari issue to review the judgment and opinion in this case of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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---

[5] Murabayashi v. Honolulu Federal Savings & Loan Ass'n, 848 F.2d 1243 (9th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1173 (1989); Potenze v. New York Shipping Ass'n, Inc. 804 F.2d 235 (2d Cir. 1986), cert. denied, ____ U.S. ___ 107 S.Ct. 1955 (1987) (No. 86-1462); Federal Savings & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.), cert. denied sub nom., Van Voorhis & Skaggs v. Federal Savings & Loan Ins. Corp., ___ U.S. ___, 109 S. Ct. 127 (1988) (No. 88-4).